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In the
Supreme Court of the United States
October Term, 1995

Kathleen McKown, William McKown,
Mario Tosto, and Quinna Lamb,

Petitioners,

vs.

Douglass G. Lundman, as trustee
for the next of kin of Ian
Douglass Lundman, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Michael W. McConnell
Counsel of Record
Gary A. Orseck
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

Attorneys for Petitioners

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Terrence J. Fleming
Ansis V. Viksnins
Lindquist & Vennum
P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

Attorneys for Petitioner
Kathleen McKown

Ronald J. Riach
Franke & Riach
200 Rosedale Tower
1700 West Highway 36
Roseville, MN 55113
(612) 636-6400

Attorneys for Petitioner
William McKown

Wendy J. Wildung
Sidney J. Spaeth
Faegre & Benson
P.L.L.P.
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

Attorneys for Petitioner
Mario Tosto

D. Patrick McCullough
McCullough, Smith &
Wright, P.A.
905 Parkway Drive
St. Paul, MN 55106
(612) 772-3446

Attorneys for Petitioner
Quinna Lamb

QUESTIONS PRESENTED

1. Whether the First Amendment permits state courts to create a new tort law duty that effectively prohibits the practice of a religion, in the face of a substantially less restrictive alternative, enacted by the legislature, which adequately protects the state's interests.

2. Whether liability may be imposed on a clergyman for allegedly negligent or unreasonable performance of his religious function.

3. Whether due process principles of fair notice permit state courts to impose damages on individual believers for religiously motivated conduct that was reasonably interpreted as falling within the scope of statutes passed for the specific purpose of protecting and accommodating that conduct.

PARTIES TO THE PROCEEDING

In addition to the petitioners, the following parties were defendants in the district court and appellants in the Minnesota Court of Appeals: Clifton House, Inc.; The First Church of Christ, Scientist; and James Van Horn. Because the judgments against these parties were reversed by the Court of Appeals in their entirety, they have no legal interest in this Petition.

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PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Petitioners Kathleen McKown, William McKown, Mario Tosto, and Quinna Lamb respectfully petition for a writ of certiorari to review the decision of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Minnesota (Pet. App. 1a-64a) is reported at 530 N.W.2d 807. The opinion of the district court (Pet. App. 65a-125a) is not reported.

JURISDICTION

The decision of the Court of Appeals was filed on April 4, 1995. Timely Petitions for Review to the Supreme Court of Minnesota were denied on May 31, 1995. Pet. App. 126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

This case involves the imposition of $1.5 million in damages against four individuals of modest means for their reliance on spiritual treatment in the care of Ian Lundman, the 11-year-old son of petitioner Kathleen McKown and her ex-husband, respondent Douglass Lundman.

I. Facts

The four petitioners are Ian Lundman's mother Kathleen McKown, a lifelong Christian Scientist who made all of her son's health care decisions; Ian's stepfather William McKown who made none of them; the Christian Science practitioner, Mario Tosto, engaged by Kathy solely to provide Ian with spiritual treatment through prayer;[1] and the Christian Science nurse, Quinna Lamb (now Giebelhaus), who was hired to look after Ian's physical comfort. After Ian's death, they were sued by respondent Douglass Lundman, Ian's birth father who had left both Christian Science and Ian's mother during the 1980s. Although respondent, upon divorce, ceded full custody of their two children to Kathy, sought no agreement about

[1] A Christian Science practitioner is a specially experienced person who through consecration, study under an authorized teacher, and satisfactory evidence of successful healing, is available to provide spiritual treatment through prayer, usually for a nominal fee. Practitioners have no medical training, and engage in neither the diagnosis nor the physical treatment of disease.

medical treatment from her, deferred to Kathy's decision to rely on spiritual treatment even when the children were in his care, and never requested that she resort to conventional medicine for either child, the jury awarded him over $14 million in damages when Ian died under Christian Science care.

In May 1989, Ian Lundman, 11 years old, contracted juvenile onset diabetes. There was no history of diabetes in the family and it was not until postmortem examination that the diagnosis was made. 7/29 T. 26. On May 6, 1989, he complained to his mother that his stomach hurt. 7/26 T.82. Consistent with her religious beliefs, Pet. App. 18a, Kathy immediately began to pray for her son. She had lifelong experience with spiritual healing and had found it successful for her children in both serious and ordinary cases. 7/26 T. 80-81; 7/27 T. 47-57, 72-73, 81-82, 112-17; 7/28 T. 80; 8/5 T. 128. Consequently, she was confident that, in relying upon spiritual treatment, she was not only following her faith, but choosing what she believed to be the best treatment available for her son. 7/27 T.16, 131; 7/28 T.27; 8/10 T.224-226. It is undisputed that Kathy, and the other petitioners, were entirely sincere in their belief in the efficacy of spiritual treatment. Pet. App. 27a.

The next day, when Ian's condition had not improved, Kathy retained petitioner Mario Tosto, a Christian Science practitioner, to pray for Ian, 7/26 T.84-85; 8/4 T.70-75, and later obtained the services of petitioner Quinna Lamb, a Christian Science nurse, to attend to Ian's physical comfort. 7/22 T.93; 7/26 T.124. Despite their efforts, less than three days after his initial complaint, Ian died at home. 7/22 T.93, 95, 98-99, 101-105, 112, 116, 119-120, 122.

II. Statutory Protection for Spiritual Treatment

Minnesota, in common with more than 40 other states, has enacted legislation that appears to permit parents to rely exclusively upon "spiritual treatment" in lieu of medical care when their children are sick. In Minnesota, as elsewhere, the protective provision is found in a "child neglect" statute in the form of a spiritual treatment exception to the health care requirement:

> If a parent * * * responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment * * * of the child, this treatment or care is "health care," for purposes of this clause.

Minn. Stat. § 609.378, subd. 1(a)(1). It is undisputed that, in entrusting Ian's healing to Christian Science, Kathy McKown believed that she was acting in accordance with this law.

Since Ian's death, the Minnesota Legislature has enacted legislation that requires the parent to report to proper authorities when a child faces serious danger to his health. Minn. Stat. § 626.556. This enables the State to exercise its authority in appropriate cases, pursuant to Minn. Stat. § 626.556, subd. 10e(c), to provide medical treatment for the child over the parent's objections, but places no obligations on parents who are relying on spiritual treatment to summon a physician.

III. The Earlier Criminal Prosecution

On October 10, 1989, a grand jury returned second-degree manslaughter indictments against Kathy and Bill McKown and Mario Tosto. The Hennepin County District Court dismissed the indictments on the basis of the Minnesota spiritual care provision and fair notice principles of due

process. The Minnesota Court of Appeals and the Minnesota Supreme Court overturned the district court's statutory construction, but affirmed the dismissal of the indictment on due process notice grounds. *State* v. *McKown*, 461 N.W.2d 720 (Minn. Ct. App. 1990), *aff'd*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 502 U.S. 1036 (1992). As the Minnesota Supreme Court held, "where the state has clearly expressed its intention to permit good faith reliance on spiritual treatment and prayer as an alternative to conventional medical treatment, it cannot prosecute respondents for doing so without violating their rights to due process." 475 N.W.2d at 68-69.

IV. Lower Court Proceedings In This Case

On April 30, 1991, respondent Lundman, as trustee of Ian's estate, brought this action for wrongful death against petitioners, as well as The First Church of Christ, Scientist, and other parties that are not before this Court. Following a seven-week trial in July and August 1993, the jury found all of the defendants negligent, and apportioned among them compensatory damages of $5.2 million. In a separate proceeding, the same jury awarded $9 million in punitive damages against the Church alone. The court denied all post-trial motions but remitted the compensatory damages to $1.5 million.

On appeal, the defendants argued that imposition of tort liability in the face of the Minnesota statute permitting good faith reliance on spiritual treatment is no more constitutionally permissible than is criminal prosecution for the same conduct. The Minnesota Court of Appeals rejected that argument, solely on the ground that "confusion on * * * *civil liability* is of much less force than uncertainty as to * * * *criminal prosecution*." Pet. App. 30a (emphasis in original). The Court of Appeals also rejected without analysis the defendants' argument that a rule requiring Christian Scientist parents to

rely on medical care for their children -- in direct contravention of their religious beliefs -- is not the least restrictive means by which the state can further its interest in protecting children's health. The Court held that the reporting requirement subsequently enacted by the Minnesota legislature was not a less restrictive alternative under the First Amendment because it would "not always work." Pet. App. 28a. Finally, the court did not even address petitioner Tosto's argument that the "clergy malpractice" claim against him violated the First Amendment. See Tosto App. Br. 39-42; Tosto JNOV Mem. 2-12.

The Court of Appeals reversed the compensatory damage award as to three defendants who owed no duty of care to the decedent, Pet. App. 38a-45a, and the punitive damages award against the Church on constitutional and independent state law grounds. *Id.* at 22a-25a. It affirmed the compensatory damage award against petitioners. The Minnesota Supreme Court denied further review. Pet. App. 126a.

REASONS FOR GRANTING THE WRIT

The practice of Christian Science gives rise to recurring and difficult questions under the Religion Clauses of the First Amendment. Based on the teachings of Mary Baker Eddy, on the reports of thousands of Christian Scientists who have experienced healing without medical intervention,[2] and on

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[2] There have been more than 50,000 published reports of successful Christian Science healings, a substantial number of which involved healing of conditions medically diagnosed as congenital, degenerative, or terminal. "Christian Science," *Encyclopedia Britannica* 562, 564 (15th ed. 1984). Analyses of these reports can be found in Robert Peel, *Spiritual Healing in a Scientific Age* (1987), and the Appendix: "An Empirical Analysis of Medical Evidence in Christian Science Testimonies of Healing, 1969-1988," to *Freedom and Responsibility: Christian Science Healing for Children* 109 (1989).

their own personal experiences of spiritual healing, Christian Scientists firmly believe that the most efficacious form of treatment involves a regimen of prayer, and that reliance on conventional medicine only interferes with the effort to heal through spiritual means. This does not mean that Christian Scientists sacrifice health to religion, and certainly not that they "martyr" themselves or their children. Since they regard spiritual treatment as the most effective way to restore health, Christian Scientists, such as petitioner Kathy McKown, provide it for their children just as they do for themselves.[3]

Even in the secular world, Christian Science treatment has won a considerable measure of respect. Deaths of children in Christian Science care have been extremely rare, and there is no evidence that Christian Science children, as a group, are any less healthy, or that fewer of them survive to adulthood, than children treated by conventional medicine. The modest costs involved in Christian Science treatment are generally eligible for health insurance coverage, and the Internal Revenue Service treats uninsured payments to Christian Science practitioners as deductible medical expenses. See IRS Publication 17 (Rev. Nov. 1985). And more than 40 states have enacted statutes specifically recognizing spiritual treatment, such as Christian Science, as an acceptable form of health care for children. See Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes,*

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[3] In this case, for example, Kathy McKown testified to healing she had experienced as a child through Christian Science, as well as healing that her children, including Ian, had experienced on many earlier occasions. 7/27 T. 47-48 (healing of earaches and deafness); 7/27 T. 49-57 (healing of various conditions as an adult); 7/27 T. 72-73, 81-82 (healing of Ian's sister Whitney); 7/26 T. 80-81, 7/27 T. 112-117, 7/28 T. 80, 8/5 T. 128 (earlier healings of Ian of impetigo, warts, stomach illness, laceration of the thumb, and red spots). The record establishes that Kathy has never resorted to medical treatment for her personal health needs. 7/26 T. 46-47, 7/27 T. 39-57, 70-79.

Manslaughter Prosecutions, and Due Process of Law, 30 HARV. J. ON LEGIS. 135, 142-43 nn.41-45 (1993) (collecting statutes).

Minnesota has a typical statutory structure. A parent who deprives a child of "health care" is criminally liable for child neglect. Minn. Stat. § 609.378. But if a parent or other caregiver in good faith selects and "depends upon" spiritual treatment as remedial care for a child, that is "'health care,' for purposes of this clause." *Id.*

In the past decade, however, courts in a number of states, now joined by Minnesota, have effectively abrogated the protections of these spiritual treatment provisions. The decision below is characteristic.[4] If a child dies, the courts have held, the spiritual treatment provision affords no protection either against criminal manslaughter liability, *State* v. *McKown*, 475 N.W.2d 63 (Minn. 1991), or now, against civil tort liability. Pet. App. 45a-47a. Accordingly, for the first time, Christian Science parents are threatened with criminal and civil sanctions for the practice of their religion and for providing to their children what they consider the best form of health care.

The importance of this case can scarcely be overstated.[5] It has direct and immediate impact on the way in which

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[4] For similar decisions in other states, see *Walker* v. *Superior Court*, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988), cert.denied, 491 U.S. 905 (1989); *Hermanson* v. *Florida*, 570 So.2d 322 (Fla. Ct. App. 1990); *Hall* v. *State*, 493 N.E.2d 433 (Ind. 1986); *Commonwealth* v. *Twitchell*, 416 Mass. 114, 617 N.E.2d 609 (1993).

[5] This case has been widely recognized as the leading case on these issues, and of national importance. In earlier filings, respondent described the case as one of "exceptional importance." Petition of Douglass Lundman for Review in the Minn. Sup. Ct., at 1.

Amicus briefs were filed in the court below by the American Academy of Pediatrics, the American Medical Association, the Minnesota Chapter of the American Academy of Pediatrics, the Minnesota Medical Ass'n, The Archdiocese of St. Paul and Minneapolis,

Christian Science parents can practice their religion, as well as on members of other faiths who rely on spiritual treatment for disease. Moreover, it provides this Court an opportunity to clarify an aspect of First Amendment law that is a source of great confusion and inconsistency among the state and lower federal courts: the principle that the state may not impose destructive penalties on the exercise of religion where more narrowly tailored, less restrictive alternatives are available that would achieve the government's purpose. This is an issue of importance not just to these petitioners, or even to free exercise claimants generally, but to claimants of constitutional rights in any context where less restrictive alternative analysis applies. The case also provides an opportunity to resolve a conflict among the lower courts regarding the imposition of civil liability for clergy malpractice, and to correct a conflict between the decision below and this Court's cases regarding due process principles of notice as they apply to First Amendment-protected conduct.

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the Christian Church (Disciples of Christ), the Church of Jesus Christ of Latter-Day Saints, the Church of the Nazarene, the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod, the National Association of Evangelicals, the National Council of the Churches of Christ in the USA, the Orthodox Church in America, the United House of Prayer for all People of the Church on the Rock of the Apostolic Faith, the Minnesota Trial Lawyers Ass'n, Americans United for Separation of Church and State, and the Minnesota Civil Liberties Union. Needless to say, this is unusual for a case in an intermediate state appellate court.

I. THE FIRST AMENDMENT PROHIBITS THE STATE FROM IMPOSING COMMON LAW OBLIGATIONS DESTRUCTIVE OF A RELIGION WHERE THE LEGISLATURE HAS ENACTED A LESS RESTRICTIVE ALTERNATIVE THAT ACHIEVES THE STATE'S COMPELLING PURPOSE

It is well established that the state may not make or enforce a law that substantially impedes the free exercise of religion unless it can demonstrate that it is "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). "[A] law restrictive of religious practice must advance 'interests of the highest order' *and* must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 113 S. Ct. 2217, 2232 (1993) (citing *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978), quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) (emphasis added). If the state's purposes can be served by a means that is less restrictive of religious freedom, the state is not free to adopt the more severe restriction.[6]

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[6] At no point in this litigation has respondent or any lower court argued that the lesser standard of protection for neutral laws of general applicability, enunciated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), applies to this case. Nor could they. Both the statutory and the common law rules involved in this case are specifically directed to religion. Minn. Stat. §§ 609.378 and 626.556 both contain special provisions for cases in which the child's parent relies in good faith on "spiritual means or prayer for treatment or care of disease." The decision below, similarly, imposed "a standard of care taking account of 'good-faith Christian Scientist' beliefs," rejecting the argument that it should apply a generally applicable "reasonable person standard." Pet. App. 49a. Accordingly, since the legal rules at issue are *not* generally applicable, but are "specifically directed at religion," *Smith* does not apply. Cf. *Lukumi*, 113 S. Ct. at 2231-33.

The essential vice of the common law rule adopted below is that it curtails the practice of religion in the face of a less restrictive means for bringing about medical intervention that has won the confidence of the legislature.[7]

A. The Common Law Of Minnesota, As Interpreted By The Decision Below, Regulates Belief And Speech, As Well As Conduct, And Effectively Prohibits The Exercise Of The Religion Of Christian Science

Among the fundamentals of the Christian Science faith, founded by Mary Baker Eddy in the late 19th century, is the teaching that illness is not a reality in God's creation. Accordingly, the treatment of disease in Christian Science is accomplished not through physical means, but through prayer. In Christian Science practice, prayer does not consist of asking God for relief from illness or suffering, but of striving for a better perception of the underlying spiritual law that nullifies illness. It is antithetical to this approach, which requires a wholehearted and undivided mental and spiritual commitment, for the Christian Scientist to adopt belief in the reality of the physical condition, or to summon a physician to "treat" it. 8/11 T.469-470.[8]

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[7] Petitioners are authorized by The First Church of Christ, Scientist, to represent to the Court that it supports the petitioners' position regarding this less restrictive alternative.

[8] Contrary to popular misperception, Christian Science does not teach that summoning medical care is sinful, nor that the use of medicine is punished in this world or the next. Individual Christian Scientists are entirely free to decide for themselves what form of treatment to use. Christian Science practitioners scrupulously refrain even from advising patients about this decision; they are available to help those who determine to rely on Christian Science healing rather than to persuade or

The law of Minnesota, as interpreted by the decision below, imposes severe burdens on the practice of Christian Science in four distinct ways, all of which are unnecessary because the state can accomplish its purposes without imposing any of them. See section B, *infra*.

First, the court has placed the obligation to summon a medical doctor directly on the parents or, failing that, on the Christian Science caregiver. This renders further practice of Christian Science healing in the case impossible, because the act of summoning the physician (especially as part of a process that, as a practical matter, involves attending and assisting in the medical treatment, consulting with the doctor, and making subsidiary medical decisions) is inconsistent with the mental commitment to spiritual reality that Christian Science healing demands. If there is to be medical intervention, it is essential that the decision be made and carried out by outside authorities, with as little involvement by the parents as possible, so that their religious method of healing can continue.

Second, the legal obligation imposed by the court below is a regulation not just of conduct, but of *belief*. According to the court, the Christian Science practitioner "had a responsibility on these facts to acknowledge that Christian Science care was not succeeding and to persuade mother to call in providers of conventional medicine or, persuasion failing, to override her." Pet. App. 38a. To coerce a practitioner or parent to "acknowledge" that Christian Science treatment is ineffective and that a medical doctor is needed is the equivalent of forcing a theist to "acknowledge" that there is no God.[9] The government may have the power to compel a

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cajole the unwilling. Nonetheless, Christian Scientists believe that turning to medicine, which reflects a belief at odds with spiritual reality, will frustrate the progress of spiritual healing.

[9] If a patient under Christian Science care is not responding to treatment, the answer (according to Christian Science practice) is not to

religious adherent to perform certain acts, but it has no authority to tell him what he should believe. The right to believe, this Court has repeatedly said, is "absolute." *McDaniel* v. *Paty*, 435 U.S. 618, 627 (1978); *Torcaso* v. *Watkins*, 367 U.S. 488, 492 (1961); *United States* v. *Ballard*, 322 U.S. 78, 88 (1944); *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940).

Third, in violation of fundamental principles of freedom of speech, the decision below coerces Christian Science caregivers to use their powers of persuasion to convince parents of the falsity of the religion. Not only must they "acknowledge" the failure of Christian Science themselves, but they must "persuade mother to call in providers of conventional medicine." Pet. App. 38a. But as this Court recently and unanimously held, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 115 S. Ct. 2338, 2347 (1995).[10] Surely the right of religious believers not to be compelled to persuade others to abandon their common faith is as strongly protected as the right of a veterans' group to exclude gay rights marchers from a St. Patrick's Day parade.

Fourth, in a case involving religiously motivated tort defendants, the generalized "reasonableness" standard places courts and parties in an untenable position. On the one hand, if the defendants are not permitted to explain the religious reasons for their actions and their bases for believing in them

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abandon the treatment, any more than medical doctors abandon medicine when therapy is not producing the desired result. Instead, the practitioner will modify and perhaps intensify the spiritual approach.

[10] Accord, *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 11 (1986); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

(including, in a case of this sort, evidence regarding the efficacy of Christian Science treatment), the jury cannot possibly assess the reasonableness of their conduct. On the other hand, if those religious reasons *are* placed before the jury, the jury will be permitted to decide what religious beliefs are reasonable and what are not -- a patently unconstitutional judgment for a civil court to make. *Ballard*, 322 U.S. 78 at 86-87; see *Schmidt* v. *Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991). As the Fifth Circuit noted in a similar context:

> If the jury finds the religion plausible, it will more likely deem the conduct reasonable; on the other hand, if the particular faith strikes the jury as strange or bizarre, the jury will probably conclude that the [conduct] was unreasonable. * * * [T]he jury undoubtedly assesses the plaintiff's religion in reaching its conclusion. A strong case can be made that the first amendment forbids such an assessment.

Munn v. *Algee*, 924 F.2d 568, 575 (5th Cir.), cert. denied, 502 U.S. 900 (1991).[11]

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[11] Such a proceeding is an invitation to expressions of religious bigotry, as lawyers for the other side attempt to prove that the religion is *unreasonable*. For example, in the trial in this case, plaintiff's counsel described Christian Science concepts as Orwellian "non-speak" and suggested that the Church established a dangerous set of religious teachings just to insure the livelihood of Christian Science practitioners. 8/17 T. 117-18, 134, 169. Counsel asked petitioner Tosto if he told Ian that "as long as I continue to pray for you, you're not going to receive medical care even if it means you die." 8/4 T. 98. These are just a few of the examples of deliberate attempts to distort and ridicule the petitioners' religion. Unfortunately, this unseemly mode of advocacy is largely immune to effective appellate review. See Pet. App. 57a (holding that the prejudicial remarks of plaintiff's counsel before the jury were "not *so egregious* as to require a new trial") (emphasis added).

Alternatively, the court could evaluate the conduct on the basis of the defendant's perspective: the "reasonable Christian Scientist" standard. This is apparently the approach taken by the Court of Appeals. See Pet. App. 49a. But this standard requires the jury to determine what the defendant's religion demands under the circumstances. This course, too, violates the First Amendment. See *United States* v. *Lee*, 455 U.S. 252, 257 (1981) (civil courts may not determine "whether [a believer] or the Government has the proper interpretation of [a religious] faith"); accord, *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981). Here, the Court of Appeals took upon itself the task of interpreting Christian Science religious texts for itself and concluded -- contrary to beliefs of the petitioners and their Church -- that Christian Science doctrine requires them to turn to medical treatment in some cases. Pet. App. 36a. In effect, the court told these petitioners that they had misinterpreted the teachings of their own religion. It is hard to imagine a more inappropriate role for a civil court.

Seeking to avoid these intractable problems, the Minnesota legislature instituted an objective reporting requirement and thus eliminated any need for a jury to assess the "reasonableness" of religious conduct. Unfortunately, that legislative approach was ignored by the court below.

In short, the Court of Appeals crafted a new common law remedy that, if not reviewed and reversed, will have a profoundly destructive effect on the practice of the religion of Christian Science. It effectively makes continued practice of the religion by parents when their children face life-threatening diseases impossible, violates basic constitutional principles against compelled speech and regulation of belief, and empowers juries to assess the reasonableness of religious beliefs. If these consequences were necessary to protect the lives of children, a secular court, which does not share the assumptions of Christian Science, might conceivably draw the balance as the Minnesota courts have drawn it. But for the

reasons that follow, these consequences are wholly unnecessary.

B. The Minnesota Legislature Has Already Enacted In Its Reporting Statute A Less Restrictive Alternative

After Ian Lundman's death, the Minnesota legislature examined the parental right it had created to rely on spiritual treatment in caring for children and voted to retain it, but added a requirement that parents and other caregivers who rely on it must report to child welfare authorities in cases involving "imminent and serious danger"--later amended to read "serious danger"[12] --to the child's health. Minn. Laws 1989, c. 282, art. 2, § 200, codified at Minn. Stat. § 626.556 (c). This reporting requirement is coupled with another section of the child neglect statute, Minn. Stat. § 626.556, subd. 10e(c), which authorizes a child welfare agency to cause medical treatment to be provided, in appropriate cases, even over the objections of the parents. The legislative history makes clear that this system of notice and state intervention was adopted expressly for the purpose of protecting children without undue interference with religious exercise.[13]

The development of these statutes reflects a careful policy choice that parents, who must make health care decisions for children, be assured the right to "select" and "depend upon" spiritual treatment provided that, in serious cases, they report reliance upon that form of treatment to child welfare authorities. This careful legislative accommodation stops

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[12] This amendment was made in 1994. Minn. Laws 1989, c. 209, art. 2 § 200.

[13] Legislative history in Minnesota is recorded on audio tape, from which transcriptions are made. If certiorari is granted, petitioners will provide transcripts of all relevant legislative history of these provisions.

short of requiring parents to summon medical assistance contrary to their religious convictions, while enabling the provision of medical care, when deemed necessary, in a way that intrudes less upon religious freedom.[14] By using an objective reporting requirement, coupled with authority to order medical treatment, the statute avoids the First Amendment pitfalls of compelling belief inconsistent with religion or requiring involuntary speech. And, unlike the tort remedy created by the Court of Appeals, the reporting statute reduces the potential for prejudice and entanglement by eliminating individual jury determinations of what a "reasonable Christian Scientist" would do.

Under this Court's precedents, a less restrictive alternative of this sort must be accepted unless it can be demonstrated that the more narrowly tailored alternative is inadequate so that more repressive means are necessary. *First National Bank of Boston* v. *Belotti*, 435 U.S. 765, 786 (1978); *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2234. See also *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2469 (1994) (even under intermediate scrutiny, the government bears the burden of demonstrating that a law restricting First Amendment freedoms "does not 'burden substantially more speech than is necessary to further the government's legitimate interests'") (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989).

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[14] This accommodation is similar to that provided to parents of the Jehovah's Witness faith, who abjure blood transfusions. In cases involving Jehovah's Witness children, standard practice in most states does not require parents to authorize the transfusion, but allows health care officials to authorize the transfusion by court order. See *Jehovah's Witnesses in State of Washington* v. *King County Hospital*, 390 U.S. 598 (1968), summ. aff'ing 278 F. Supp. 488 (W.D. Wash. 1967) (three judge court); *People* ex rel. *Wallace* v. *Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); *State* v. *Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).

C. The Court Of Appeals' Reasons For Rejecting This Less Restrictive Alternative Are Inadequate

The Court of Appeals rejected petitioners' argument that the reporting statute is a less restrictive alternative with the observation that a reporting requirement "does not always work and therefore is not a preclusive alternative." Pet. App. 28a. This perfunctory dismissal of petitioners' constitutional claim was grossly inadequate and in conflict with this Court's precedents. Moreover, by substituting its own view of public policy for that of the legislature, the court violated fundamental principles of separation of powers.

Adequacy of the Alternative. Under this Court's caselaw, the question is whether a challenged provision restricts constitutionally protected conduct substantially more than is necessary. *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 633 (1980); *Turner Broadcasting*, *supra*. The Court of Appeals' decision cannot be squared with this approach. The question is not whether the reporting requirement will "always work." Conventional medicine does not "always work." A common law tort suit does not "always work." And if perfection were the standard, the requirement of choosing a less restrictive alternative, which effectively (though not perfectly) furthers the state's interest, would be reduced to a nullity. This Court should not permit erosion of this vital aspect of constitutional jurisprudence.

There is every reason to believe that the legislature's reporting requirement, Minn. Stat. § 626.556, will be at least as effective as a common law tort action in protecting the children of Minnesota. The tort action serves only to punish, deter, and compensate -- *after* a child has died. The reporting

statute, by contrast, operates in advance of a tragedy, in an effort to prevent it.[15]

The Minnesota courts have already taken official notice of the effectiveness of the legislature's less restrictive legislative approach -- ironically, in the earlier criminal proceeding against the McKowns and petitioner Tosto. *McKown*, 461 N.W.2d at 722. Inexplicably, the court below ignored this previous judicial finding--while failing to engage in any serious independent analysis of the effectiveness of the reporting requirement.

It bears mention, in this connection, that the legislative reporting requirement is patterned after laws requiring parents to report contagious diseases. Such laws have been in existence in most states for decades and are scrupulously obeyed by Christian Scientists. Pet. App. 36a. The Founder of Christian Science herself recommended that adherents comply with these reporting laws, and the materials published by the Church to this day do so likewise. Mary Baker Eddy, *The First Church of Christ, Scientist, and Miscellany* 219-220 (1913). Given the success of contagious disease reporting, mere speculation that notice requirements might not "always work" is an insufficient basis for refusing to recognize the Minnesota statute as a less restrictive alternative that would protect constitutional rights. See *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 543 (1979); *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 130-31 (1988).

Separation of Powers. The decision below also brings to the fore the separation-of-powers dimension of less restrictive alternative analysis. The job of the courts, in constitutional cases, is to check legislative action that too zealously pursues

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[15] Moreover, the tort remedy will come into play only when the next-of-kin was not involved in the choice of spiritual treatment. When families are intact and united in their beliefs (probably the more common situation), there is no one to bring suit.

state interests at the price of constitutional freedoms. It is not the judicial function to limit legislatively-recognized constitutional freedoms for the purpose of more zealously pursuing state interests. The legislature is the front-line guardian of the public interest, and where it has determined that the public interest is satisfied without unduly trammeling constitutional rights, courts are not empowered to second-guess that judgment.

If certiorari is granted, petitioners will contend that where the legislature has explicitly addressed an issue touching on constitutional rights and crafted what it considers to be a balanced and appropriate legislative response, a court is *obligated* to presume that the legislative solution is an adequate means to achieve the governmental purpose, at least in the absence of powerful evidence to the contrary.

D. This Court's Guidance Is Needed To Resolve Conflicts In The State And Lower Courts Over The Requirement Of Adopting The Least Restrictive Alternative

The decision below is all too typical of the haphazard and conflicting approaches many lower courts take toward constitutional arguments based on less restrictive alternatives. In some instances, courts painstakingly examine proposed alternatives and allow constitutional restrictions only when the alternatives are plainly inadequate to achieve the government's purposes. See, e.g., *Church of Jesus Christ* v. *Jefferson County*, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990) (county rezoning procedure was not least restrictive means of maintaining "site control" where subjective factors resulted in denial to church of a development permit); *ACLU* v. *The Florida Bar*, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990) (ban on speech on issues of public dispute by candidates for judicial

office is not the least restrictive means of furthering state interest in integrity of the judiciary); *Publicker Industries* v. *Cohen*, 733 F.2d 1059, 1074 (3rd Cir. 1984) (trial judge's decision to exclude press from trial was not least restrictive means where judge had not considered alternative of bifurcating trial).

Other courts perfunctorily dismiss arguments of this sort, deferring almost automatically to government claims of "necessity." See, e.g., *Gwinn* v. *State Ethics Commission*, 262 Ga. 855, 426 S.E.2d 890, 892 (1993) (court upholds statute prohibiting regulated entities from contributing to political candidates for the office of regulator, asserting conclusorily that the ban is narrowly tailored "[i]nasmuch as the regulated entity is free to contribute to all other political campaigns"); *State in Interest of C*, 638 P.2d 165, 173 (Wyo. 1981) (removing child from custody of parent "to achieve the State's interest in the welfare of the children was *one* of the 'least intrusive' under the circumstances * * * *") (emphasis added).

Lower courts, including the court below, have rendered conflicting decisions on the extent to which a court must consider a proposed alternative that may be only slightly less effective in achieving the government's interest, but is significantly less restrictive as to the protected right at issue. As noted, the court below held that a less restrictive alternative must "always work" if it is to be accepted. Only slightly more accommodating, other courts have held that a state regulation is invalid in the face of a less restrictive alternative only where the alternative is "just as effective in achieving" the regulatory goal. *Dial Info. Serv.* v. *Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992). Still other courts weigh the effectiveness of the proposed alternative against the degree to which it would lessen the burden on the asserted individual right. See *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 124 (D.C. Cir. 1995) (en banc) (balancing effectiveness

and restrictiveness of alternatives); *Altmann* v. *Television Signal Corp.*, 849 F. Supp. 1335, 1342 (N.D. Cal. 1994) (striking down an absolute ban on indecent leased or public access programming in the face of the "adequate" though marginally less effective alternative of channel blocking).

Perhaps one reason for the inconsistency among lower courts is that this Court has never explained precisely what "less restrictive means" analysis entails. This case thus offers an opportunity for clarification that can reduce the present level of confusion and inconsistency in the lower courts.

II. THE DECISION BELOW CONFLICTS WITH LOWER COURT DECISIONS HOLDING THAT THE IMPOSITION OF LIABILITY ON CLERGY FOR THE ALLEGEDLY NEGLIGENT CONDUCT OF THEIR RELIGIOUS FUNCTIONS IS UNCONSTITUTIONAL

Liability against petitioner Mario Tosto in this case was predicated solely on a jury's judgment that he had negligently or unreasonably performed his function as a clergyman. Tosto was engaged by Mrs. McKown solely for the purpose of praying and providing *spiritual* treatment for Ian. As a Christian Science practitioner, recognized as clergy under Minnesota law, Tosto performs no medical services whatsoever, is entirely untrained in the medical perspective on disease, and need not even physically attend the sick person. A Christian Science practitioner does not advise patients about whether to rely on spiritual healing. His sole function is to assist, through prayer, those who decide to pursue the spiritual approach to healing.

The jury was empowered to decide whether Tosto performed these religious functions "reasonably," and concluded that he had not. The Court of Appeals, upholding the judgment against Tosto, held that he was under a legal

obligation "to persuade Kathy McKown to summon a physician for Ian or, failing that, to do so himself." Pet. App. 38a. Although the court did not label this form of liability "clergy malpractice," that is what it is, and it has been found unconstitutional by other state and lower federal courts. *Schmidt* v. *Bishop*, 779 F. Supp. 321, 327-28 (S.D.N.Y. 1991); *Baumgartner* v. *First Church of Christ, Scientist*, 141 Ill. App. 3d 898, 490 N.E.2d 1319, 1325, cert. denied, 479 U.S. 915 (1986); *Brown* v. *Laitner*, Mich. Ct. App. No. 73903 (Dec. 17, 1986), order granting leave to appeal vacated, 432 Mich. 861, 435 N.W. 2d 1 (1989); see also *Nally* v. *Grace Community Church*, 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948, 960 (1988), cert. denied, 490 U.S. 1007 (1989) (citing constitutional concerns in the course of rejecting clergy malpractice claims as a matter of common law). In particular, the California Supreme Court has rejected the argument that a clergyman should be held legally obliged to refer a person needing medical attention to such a speciality. *Nally, supra.*

The reason for the rejection of "clergy malpractice" causes of action was well stated in *Schmidt*:

> Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of this community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.

779 F. Supp. at 328. It is no business of secular courts to regulate the way Christian Science practitioners conduct their spiritual work.

The Court of Appeals' imposition of liability on petitioner Tosto is in clear conflict with other lower court cases, and necessitates review by this Court.

III. THE IMPOSITION OF CIVIL LIABILITY FOR CONDUCT REASONABLY DEEMED TO BE PROTECTED BY A RELIGIOUS ACCOMMODATION STATUTE VIOLATES DUE PROCESS

It is undisputed that petitioner Kathy McKown was aware of, and tailored her conduct in reliance on, Minnesota statutes that (as the state courts have recognized) appeared to authorize reliance on spiritual treatment for Ian. If the $1.5 million verdict is left standing, these statutes will have been not so much an accommodation to the free exercise of religion (as the legislature intended) as a trap for the unwary--and ironically, for those most conscientiously obeying the law.

This case therefore raises due process questions of nationwide importance. As noted above, the Minnesota statutes on which Kathy McKown relied are similar to the statutes of over 40 states. Moreover, it is already clear that this case is of nationwide concern to Christian Science parents, who may be placed in a situation of grave uncertainty about the nature of their parental rights and responsibilities, with no fair notice of what the law demands of them.

It is well established that due process standards apply with heightened vigor when First Amendment rights are at stake. As this Court has explained, "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." *Hoffman Estates* v. *Flipside*, 455

U.S. 489, 498-99 (1982). While "economic regulation" is subject to a "less strict" due process test, a "more stringent" test is required when "the law interferes with the right of free speech or of association." *Id.;* accord, *Smith* v. *Goguen*, 415 U.S. 566, 572-73 (1974). See generally Laurence H. Tribe, *American Constitutional Law* §14-11, at 1034 (1988); Henry Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). Although no case of this Court explicitly so holds, petitioners assume that the same heightened degree of protection is accorded rights protected by the Free Exercise Clause.

There is little question that these due process principles of fair warning were violated by the courts below. The Supreme Court of Minnesota has already held that it was reasonable (though erroneous) to have relied upon the spiritual treatment provision no matter how grave the illness. *McKown*, 475 N.W.2d at 68. Yet the same state courts held that petitioners were unreasonable when they acted upon that understanding and did not turn to medicine. Due process does not tolerate such contradictions.

In affirming the dismissal of the *McKown* manslaughter indictment, the Supreme Court of Minnesota held that it would be fundamentally unfair to permit a manslaughter prosecution here because the state had "clearly expressed" its permission for caregivers to "depend[] upon" spiritual treatment without indicating that such permission was limited to non-threatening cases. *Id.* Petitioners were therefore reasonable in believing they had no duty to turn to medicine because: "The spiritual treatment and prayer exception to the child neglect statute *expressly provided* respondents the right to 'depend upon' Christian Science healing methods so long as they did so in good faith." *Id.* (emphasis supplied)

Note that the judicial finding of unfairness that triggered dismissal of the indictment did *not* rest upon a conclusion that the statutory scheme was "vague." Indeed, the problem was

just the opposite. The spiritual treatment exception appears to speak precisely, and without limitation, in expressing the state's "intention to permit good faith reliance on spiritual treatment and prayer *as an alternative* to conventional medical treatment . . . ." *Id.* (emphasis supplied) In other words, the statute misled those who cared for Ian, not because it was vague, but because its very specificity lulled them into believing that the state had *authorized* that form of treatment in all circumstances even if an illness appeared to be life-threatening.

The court below declined to recognize the due process violation solely because this proceeding is civil, not criminal, in nature. Pet. App. 30a. Although this distinction between civil and criminal sanctions is important for some due process purposes, it is beside the point when the issue affects First Amendment rights. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of [torts]." *New York Times* v. *Sullivan*, 376 U.S. 254, 277 (1964). *See also*, *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) (due process principles apply to any state action depriving a defendant of liberty or property regardless of what the proceeding is called). If certiorari is granted, petitioners will argue that the same heightened standards of fair notice that apply to conduct in the criminal context apply to First Amendment-protected conduct even in the civil context. If the legislature enacts a statute that reasonably appears to protect conduct protected by the Free Exercise Clause, it violates the Due Process Clause for the State to impose civil liability on believers who act in reliance on the statute.

This is a case in which the legislature was wiser and more protective of constitutional freedoms than the court. The Minnesota legislature was able to chart a course that would achieve the State's unquestioned interest in protecting the health of children and at the same time enable members of this

religious minority to continue to practice their faith and their alternative approach to healing. For this legislative accommodation to be ignored--and over a million dollars in liability imposed on these four people for their exercise of religion in reliance on the legislative provision--makes a travesty of the constitutional ideals of free exercise of religion and due process of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 29, 1995

Respectfully submitted,

Michael W. McConnell
Counsel of Record
Gary A. Orseck
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 702-3306

Attorneys for Petitioners

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Order of the Minnesota Supreme Court (May 31, 1995) 126a

Douglass G. LUNDMAN, as trustee for the next of kin of Ian Douglass Lundman, deceased, Respondent,

v.

Kathleen McKOWN (C2-94-897), William McKown (C5-94-893), Mariano Victor Tosto (C3-94-892), Quinna Lamb, n/k/a Quinna Giebelhaus (C1-94-891), Clifton House, Inc. (C9-94-895), Appellants,

Metropolitan Open School, Defendant,

The First Church of Christ, Scientist (C0-94-896), James Van Horn (C7-94-894), Appellants.

Nos. C1-94-891, C3-94-892, C5-94-893, C7-94-894, C9-94-895, C0-94-896 and C2-94-897.

Court of Appeals of Minnesota.

April 4, 1995.

Review Denied May 31, 1995.

Natural father of child who died of juvenile-onset diabetes following three days of Christian Science care brought wrongful death action against child's mother and stepfather, Christian Science nurse and practitioner hired to treat child by spiritual means, Christian Science Church, and church official. The District Court, Hennepin County, Sean J. Rice, J., entered judgment awarding $9 million in punitive

damages and $1.5 million in compensatory damages, and appeal was taken. The Court of Appeals, Davies, J., held that: (1) award of punitive damages against church violated church's constitutional right to espouse religious faith and doctrine; (2) right to free exercise of religion did not preclude award of compensatory damages; (3) child's stepfather owed duty of care to child; (4) Christian Science nurse hired by child's mother owed child duty of care; (5) Christian Science practitioner hired by mother to pray for child owed child duty of care; (5) church official who reported child's illness to church did not owe child duty of care; (6) Christian Science nursing home that gave mother advice over telephone did not owe child duty of care; (7) church did not owe child duty of care; (8) applicable standard of care was reasonable person who was good faith Christian Scientist; and (9) grant of remittitur to award $1.5 million in compensatory damages was not abuse of discretion.

Affirmed in part and reversed in part.

Klaphake, J., filed opinion concurring in part and dissenting in part.

1. Damages 87(1)

Punitive damages serve to punish wrongdoers and deter others from similar conduct.

2. Damages 87(1)

In those instances where deterrence will not be achieved, punitive damages should not be awarded.

3. Death 93

Religious Societies 30

Christian Science Church could not be held liable for punitive damages based on death of child who was treated in

accordance with Church's teachings on spiritual healing, absent evidence that Church directly interfered in child's care or that it interfered by agency through child's caregivers.

4. **Constitutional Law 84.5(17)**
   Death 93
   Religious Societies 30

Christian Science Church's espousal of spiritual treatment was entitled to substantial free exercise protection, precluding imposition of punitive damages in wrongful death action arising from death of child who was treated only through spiritual means; punitive damages could not be imposed on church to force it to abandon teaching its central tenet. U.S.C.A. Const.Amend. 1.

5. **Constitutional Law 84.1**

Constitutional right to religious freedom includes authority of churches to independently decide matters of faith and doctrine. U.S.C.A. Const.Amend. 1.

6. **Constitutional Law 84.5(1)**
   Damages 92
   Religious Societies 30

Churches and religious bodies do not have categorical exemption from liability for punitive damages.

7. **Death 93**

Award of punitive damages against Christian Science Church in wrongful death action based on death of child who was treated only through spiritual means violated Minnesota statute on punitive damages; church officials were only aware of child's illness and that he was being treated using spiritual care, and there was no evidence that church acted in "deliberate disregard" of child's rights. M.S.A. § 549.20, subd. 1(a).

8. Constitutional Law 84.2, 84.5(1)

Although one is free to believe what one will, religious freedom ends when one's conduct offends law by, for example, endangering child's life. U.S.C.A. Const.Amend. 1.

9. Constitutional Law 84.1

In determining whether state regulation of religious conduct violates free exercise clause of First Amendment, Minnesota courts balance state's interest against actor's free-exercised interest in religious-based conduct. U.S.C.A. Const.Amend. 1.

10. Constitutional Law 84.2

Where it is undisputed that religious belief is sincerely held and that religious belief would be burdened by proposed regulation of religious conduct, balancing test requires proof of compelling state interest. U.S.C.A. Const.Amend. 1.

11. Constitutional Law 84.5(17)
Infants 20

Minnesota statutes exempting spiritual healers from criminal child neglect statutes and exempting Christian Scientists from laws that forbid practicing medicine without a license did not sanction prayer alone to treat child battling life-threatening disease. U.S.C.A. Const.Amend. 1; M.S.A. §§ 609.378, 626.556.

12. Constitutional Law 84.1

It is appropriate that disputes involving consequences of religious-based conduct be brought before civil courts where underlying lawsuit is not vehicle for attacking religious belief. U.S.C.A. Const.Amend. 1.

13. Constitutional Law 84.5(17)

Civil wrongful death action arising from death of child who was being treated through spiritual means could be adjudicated without offending right to free exercise of religion. U.S.C.A. Const.Amend. 1.

14. Constitutional Law 84.5(17)

Imposing tort liability following death of child whose illness was treated only through spiritual means did not violate due process requirement of fair notice. U.S.C.A. Const. Amend. 14.

15. Negligence 1

Basic elements of negligence claim are existence of duty, breach of that duty, injury proximately caused by breach, and damages.

16. Negligence 136(14)

Where facts are not in controversy, existence of duty is question of law in negligence case.

17. Negligence 2

Generally, there is duty to aid another only if "special relationship" exists between parties.

18. Negligence 2

"Special relationship" necessary to impose duty to aid another exists where one party has custody of another under circumstances that deprive the other of normal opportunities of self-protection.

See publication Words and Phrases for other judicial constructions and definitions.

19. Negligence 2

Special relationship necessary to impose duty to aid another may arise where one accepts responsibility to protect another, although there is no initial duty.

20. Infants 13

Custodial parent has special relationship to dependent and vulnerable child that gives rise to duty to protect child from harm.

21. Infants 13

Stepfather of critically ill child who was being treated by spiritual means had in loco parentis responsibility for child's well-being and had duty to put child's interests first, above and beyond mother's interests in exercising her religious beliefs, even if mother was primarily responsible for making decisions about child's health care.

22. Parent and Child 2(1)

There is presumption that custodial stepparents, and "visitation" stepparents during visitation, assume special-relationship duties to stepchildren.

23. Physicians and Surgeons 15(21)

Christian Science nurse hired by mother to care for critically ill child in mother's home had "special relationship" with child necessary to impose duty of care to seek help, even if advising such treatment was contrary to Christian Science nursing; nurse accepted responsibility to care for child and protect him by providing professional services in return for cash wages and should have known that right to withhold conventional medical treatment was not absolute.

24. Physicians and Surgeons 15(21)

Christian Science nurse was not exempt from civil liability for failing to seek medical care for critically ill child on ground child's mother controlled what type of care child would receive, where nurse held herself out as professional with special training, skill and experience in caring for others.

25. Physicians and Surgeons 15(17.1)

Professional Christian Science caregivers cannot successfully disavow their professional duty to sick child by deferring to parent as ultimate decision-making authority.

26. Physicians and Surgeons 15(17.1)

Trained Christian Science practitioner who was hired by critically ill child's mother to pray for child's recovery owed duty to acknowledge that Christian Science care was not succeeding and to persuade mother to call providers of conventional medicine or, persuasion failing, to override mother and personally call for either doctor or authorities.

27. Physicians and Surgeons 15(17.1)

Trained Christian Science practitioner was required to temper his use of Christian Science health care to conform his actions to law of community.

28. Religious Societies 30

Christian Science church official who had been notified that member's child was ill and suggested that child be treated by Christian Science practitioner did not have special relationship with child necessary to impose duty that official suggest that child receive conventional medical care.

29. Asylums 7

Nonprofit corporation that operated Christian Science nursing facility did not assume duty of care for member's

critically ill child by providing free nutritional advice to member over the telephone when informed of the child's illness.

30. Principal and Agent 23(5)

Evidence that Christian Science nursing home referred one of its nurses to members who had reported that their child was seriously ill and that members subsequently hired nurse to provide spiritual care for their child was insufficient to establish that nurse was agent of nursing home, subjecting home to liability for child's subsequent death, absent evidence that nursing home made "manifestation" that nurse was acting on its behalf or evidence that it had right to control nurse's actions or conduct.

31. Principal and Agent 24

Whether agency relationship exists is generally question for jury, unless evidence is conclusive.

32. Principal and Agent 23(5)

Evidence that Christian Science nurse and practitioner who treated seriously ill child by spiritual means were listed as approved in Christian Science publication was insufficient to establish that they were agents of Christian Science Church, absent evidence that Church had right to control means and manner of practitioner's and nurse's performances in caring for child beyond approved advertisement and control derived from their acceptance of religious doctrine espoused by church.

33. Religious Societies 30

Christian Science Church's power to instruct its Christian Science nurses, practitioners and followers to suggest medical care when life of child was threatened by continued reliance on spiritual care was insufficient to warrant imposition of duty on

church to advise its members to seek medical care for seriously ill child.

34. Constitutional Law 84.1

Church always remains free to espouse whatever religious belief it chooses; it is practices of its adherents that may be subject to state sanctions. U.S.C.A. Const. Amend. 1.

35. Parent and Child 11

Physicians and Surgeons 15(17.1, 21)

Statutes exempting parents who attempt to heal child by spiritual means from criminal child neglect statute did not establish civil standard of care in negligence action against mother, stepfather, Christian Science nurse and Christian Science practitioner arising from death of child who was treated by spiritual means. M.S.A. §§ 609.378, 626.556.

36. Physicians and Surgeons 15(17.1, 21)

Standard of care applicable to Christian Science practitioner and nurse who cared for seriously ill child was that of a reasonable person who was a good faith Christian Scientist.

37. Physicians and Surgeons 15(17.1)

Reasonable Christian Science care is circumscribed by obligation to take state's and child's side in tension between child's welfare and parents' freedom to rely on spiritual care when caring for sick child.

38. Constitutional Law 84.5(17)

Parent's conduct when caring for sick child, though motivated by religious belief, must yield when, judged by accepted medical practice, it jeopardizes life of a child; religious practices must bend to state's interest in protecting

welfare of child whenever child might die without intervention of conventional medicine.

39. Parent and Child 11

Physicians and Surgeons 15(17.1, 21)

Seriously ill child's mother and stepfather, who sought to heal child by spiritual means, and Christian Science practitioner and nurse who were hired by parents to care for child, breached standard of care of reasonable Christian Scientists and could be held liable for child's death from juvenile-onset diabetes; child's caregivers failed to seek medical help in three days leading to child's death, despite continuous dramatic indications that child was ill with life threatening disease and that he would die, given continued reliance on Christian Science prayer.

40. Appeal and Error 969, 970(2)

Trial 18, 43

Rulings on evidentiary matters and conduct of trial are left to discretion of trial court and will not be reversed absent abuse of discretion; further, new trial will be granted only if errors resulted in prejudice to complaining party.

41. Witnesses 52(1)

Marital privilege should be narrowly construed so as not to interfere with process of determining truth. M.S.A. § 595.02, subd. 1(a).

42. Witnesses 52(1)

In each instance, court should determine validity of marital privilege by considering whether testimony will actually be adverse. M.S.A. § 595.02, subd. 1(a).

43. Witnesses 52(3)

Trial court did not abuse its discretion in allowing nonadverse spousal testimony in negligence action. M.S.A. § 595.02, subd. 1(a).

44. Witnesses 215

Clergy privilege did not apply to testimony concerning why Christian Science practitioner did not pray for critically ill child in child's presence, where there was no question asked regarding a communication. M.S.A. § 595.02, subd. 1(c).

45. Evidence 359(1)

Mere fact that photographs are graphic is not adequate reason to exclude them from trial.

46. Evidence 380

Police officer's testimony that photographs accurately depicted how deceased child looked minutes after officer arrived on scene and physician's testimony that photographs reflected how child with juvenile-onset diabetes would appear provided adequate foundation for photographs to be admitted into evidence in negligence action arising from child's death.

47. Death 89

Next of kin of decedent in wrongful death case may not recover for emotional distress or suffering.

48. Witnesses 396(1)

Evidence that deceased child's father was taking medication for depression was admissible in wrongful death case to explain father's inconsistent pretrial and trial testimony.

49. Evidence 155(1)

Admission into evidence in wrongful death action of letter defendant had written to county attorney did not "open

door" for further evidence regarding prior criminal proceedings arising from child's death, where letter had been redacted to make it both admissible and nonprejudicial.

50. Witnesses 204(2)

Father's handwritten notes from unrelated prior custody proceeding, which allegedly showed that father knew, before his child's illness, that mother would use Christian Science care if child ever became ill was protected by attorney-client privilege in subsequent wrongful death action arising from child's death.

51. Evidence 155(1)

Defendants' introduction of testimony and exhibits on subject of Christian Science health care made other testimony regarding religious documents and policies admissible in action arising from death of child whose illness was treated by spiritual means.

52. Death 60

Evidence concerning whether parents who were members of Christian Science church and treated their seriously ill child with spiritual healing gave child choice regarding his health care was relevant in subsequent wrongful death action to distinguish case from others where individual freely chose to undergo Christian Science treatment.

53. Appeal and Error 1060.6

Evidence that Christian Science nursing home had purchased liability insurance for its employees, admitted when witness, in response to question as to why he believed nursing home could be defined as health care provider, testified that it had liability insurance for its employees, was not prejudicial in wrongful death action arising from death of child who was treated by spiritual means; testimony was part of narrative

answer covering many things that placed no emphasis on the item, and information already been admitted into evidence through nursing home's manual.

54. Appeal and Error 1060.1(1)

To be reversible error, improper remarks during closing arguments must clearly influence verdict.

55. Appeal and Error 969

Appellate court will not reverse district court's decision in selecting language in jury instructions unless instructions constitute abuse of discretion.

56. Trial 58

Withdrawal of evidence is discretionary with trial court and is allowed where evidence is irrelevant and immaterial.

57. Appeal and Error 979(5)
New Trial 162(1)

Decision whether to grant remittitur is within trial court's sound discretion; when trial court grants remittitur and gives it reasons, appellate court is unlikely to tamper with that determination.

58. Death 99(3)

Grant of remittitur to award $1.5 million in compensatory damages for death of child, rather than $5.2 million awarded by jury, was not abuse of discretion in wrongful death action arising when seriously ill child was treated by spiritual healing.

Syllabus by the Court

1. The imposition of punitive damages against a church, based on its teaching of spiritual healing, violates church's

right under state and federal constitutions to espouse religious faith and doctrine.

2. The constitutional right to the free exercise of religion does not extend to conduct that threatens a child's life.

3. A notice of illegality may fall short of the fair notice requirement for criminal prosecution without falling short of the less rigorous notice of illegality required to assert a common law negligence claim.

4. A civil claim against a person whose religious faith embraces spiritual healing is not barred because it is that faith that causes the person to fail to act in accord with state's interest in child welfare.

5. An individual has a legal duty to aid another when there is a special relationship between the parties.

6. A special relationship creating a duty to aid exists when the first party is particularly vulnerable and dependent and the other party holds "considerable" power over the first party's welfare or accepts a responsibility to protect the first.

7. There is a rebuttable presumption that a stepparent assumes an in loco parentis duty of care to a child.

8. Duty and causation are separate elements of a negligence claim.

9. Mere knowledge of a child's illness does not create a special relationship that supports a duty of care.

10. Without more, telephone advice is an insufficient ground to find that a nursing home assumed a duty of care or that a special relationship was established.

11. A jury's finding of agency is perverse and palpably contrary to the evidence where evidence unequivocally shows that the alleged principal lacked the right to control the alleged agent.

12. When a person acts on a genuinely held religious belief in spiritual healing, the standard of care is that of a reasonable person acting on that same belief. But that standard of care requires that the religious belief yield to the

state's interest in protecting the welfare of children suffering from life-threatening diseases.

13. Marital privilege does not apply to testimony that is not adverse to the interest of a spouse asserting the privilege.

14. Clergy privilege does not apply to testimony that does not concern a confidential communication.

15. A trial court may, without abusing discretion, admit testimony that is offered to explain inconsistent testimony and is admissible for that purpose, though it would be inadmissible for another purpose.

16. A trial court may, without abusing discretion, exclude privileged evidence inadvertently disclosed to party-opponent.

17. A trial court may, without abusing discretion, admit evidence regarding religious documents and policies where objecting party has introduced similar testimony and exhibits.

18. A trial court may, without abusing discretion, allow testimony regarding party's liability insurance where testimony is part of a narrative answer that places no emphasis on the item, and information has already been properly admitted in a different form.

19. A trial court may, without abusing discretion, strike an irrelevant and immaterial affidavit and instruct the jury to disregard it.

James H. Kaster, Nichols, Kaster & Anderson, Minneapolis, Robert J. Bruno, Robert J. Bruno & Associates, Burnsville, for respondent Douglass G. Lundman, as trustee for the next of kin of Ian Douglass Lundman, deceased.

Terrence J. Fleming, Ansis V. Viksnins, Lindquist & Vennum, Minneapolis, for appellant Kathleen McKown.

Ronald J. Riach, Franke & Riach, Roseville, for appellant William McKown.

Larry B. Leventhal, Michael C. Hager, Larry B. Leventhal & Associates, Minneapolis, for appellant Mariano Victor Tosto.

D. Patrick McCullough, McCullough, Smith & Wright, St. Paul, for appellant Quinna Lamb, n/k/a Quinna Giebelhaus.

Donna J. Blazevic, Charles E. Lundberg, Gregory W. Deckert, Bassford, Lockhart, Truesdell & Briggs, P.A., Minneapolis, for appellant Clifton House, Inc.

Terrence J. Fleming, Ansis V. Viksnins, William G. Christopher, Holland & Knight, Tampa, FL, for appellant The First Church of Christ, Scientist.

Wendy J. Wildung, Sidney J. Spaeth, Faegre & Benson, Minneapolis, Seth M. Colton, Maun & Simon, P.L.C., St. Paul, for appellant James Van Horn.

Stanton Gregg Kunzi, Hogan & Hartson, L.L.P., Washington, DC, for amici curiae American Academy of Pediatrics, American Medical Ass'n, Minn. Chapter of American Academy of Pediatrics, and Minn. Medical Ass'n.

Steven K. Green, Americans United for Separation of Church and State, Washington, DC, for amicus curiae Americans United for Separation of Church and State, in Support of Appellant, The First Church of Christ, Scientist.

Karl L. Cambronne, Jeffrey D. Bores, Chestnut & Brooks, P.A., Minneapolis, William S. Fallon, Chancellor, The Archdiocese of St. Paul and Minneapolis, St. Paul, for amicus curiae The Archdiocese of St. Paul and Minneapolis, et al.

Peter M. Lancaster, Timothy E. Branson, Paul J. Robbennolt, Dorsey & Whitney, Minneapolis, for amicus curiae Minn. Civ. Liberties Union.

Michael Weiner, Yaeger, Jungbauer, Barezak & Roe, Sharon L. Van Dyck, Schwebel, Goetz, Sieben & Moskal, Minneapolis, for amicus curiae The Minn. Trial Lawyers Ass'n.

Considered and decided by KLAPHAKE, P.J., DAVIES and MULALLY,* JJ.

OPINION

DAVIES, Judge.

The parties appeal from a judgment imposing liability and the denial of their posttrial motions in this wrongful death action. We affirm as to some parties and reverse as to others.

FACTS

Ian Lundman died at age 11 from juvenile-onset diabetes following three days of Christian Science care. A medical professional would have easily diagnosed Ian's diabetes from the various symptoms he displayed in the weeks and days leading up to his death (particularly breath with a fruity aroma). Although juvenile-onset diabetes is usually responsive to insulin, even up to within two hours of death, the Christian Science individuals who cared for Ian during his last days failed to seek medical care for him—pursuant to a central tenet of the Christian Science religion. This wrongful death action followed.

We begin the morning of May 6, 1989, when, after having been ill and lethargic intermittently for several weeks, 11-year-old Ian Lundman complained to his mother that he was again not feeling well, specifically that he had a stomachache. Ian's mother, appellant Kathleen McKown (mother), noticed that Ian had lost a "noticeable" amount of weight, had a fruity aroma on his breath, and lacked his normal energy. Consistent

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

with the tenets of the Christian Science church, which she espoused, mother began treating Ian through prayer. Throughout the day, Ian continued to complain of a stomachache.

When Ian again complained to his mother about not feeling well the next morning (day two), she became more concerned. Because the Christian Science Church recommends that a journal-listed practitioner be hired when a parent is concerned about a child's health, mother contacted appellant Mario Tosto regarding Ian's condition. As a "journal-listed" practitioner, Tosto appears in a Christian Science publication as someone who is specially trained to provide spiritual treatment through prayer. Mother hired Tosto to begin praying for Ian.

When, despite his illness, Ian attended Sunday School that morning, his Sunday School teacher observed that he appeared tired. Ian's mother was concerned about his low energy level and his continued need to eat mints to mask his breath odor. She noted during an afternoon visit to his grandmother's home that the usually-active Ian lacked energy to do anything but lie on the sofa. Ian also vomited while at his grandmother's home.

Ian was unable to sleep the night of May 7, and several times in the early morning hours of May 8 (day three) he complained of illness, seeking his mother's help and comfort and stating that he did not want to be alone. Ian's fear of being alone caused mother to have still greater concern. At this point, the downward spiral of Ian's health accelerated. He was unable to keep any food down that morning; Ian's visible weight loss, coupled with his inability to eat, caused mother to fear that her son might die.

Seeking further outside help, mother and appellant William McKown (her husband and Ian's stepfather) made several telephone calls on day three. First, pursuant to church directives, mother contacted appellant James Van Horn, who

served as the one-person Christian Science Committee on Publications (CoP) for Minnesota. Learning that she intended to rely on Christian Science care, Van Horn verified that mother had contacted a journal-listed practitioner; and he later notified appellant The First Church of Christ Scientist (First Church) in Boston, that a child of a Christian Scientist was seriously ill. (First Church is known as the "mother" church of Christian Science.)

Second, mother called a Christian Science nursing home, appellant Clifton House, and a nurse advised her to give Ian small quantities of liquids. Third, William McKown (who is also a Christian Scientist) made a follow-up call to Van Horn because, fearing that Ian might be suffering from a contagious disease, he wanted Van Horn to give him telephone numbers for state or local health departments. (The church, as a regular practice, alerts Christian Scientists to the legal requirement to report contagious disease.) Fourth, William McKown called Clifton House again and told the nurse that Ian was not drinking the liquids that had previously been suggested.

Ian's condition worsened throughout day three; by that afternoon he was unable to eat, drink, or even communicate with others, and he could not control his bladder. He had to be carried to join his family at dinner, and at one point, looking at his mother and not recognizing her, said, "My name is Ian, too." This disorientation reinforced her concern that Ian's condition was life-threatening.

At approximately 8:00 p.m., mother called Clifton House, seeking to have Ian admitted. But Clifton House regulations prohibit admitting anyone under 16, so mother decided that she would take Ian to North Memorial Hospital. Mother dismissed the idea of seeking medical help, however, when Ellen Edgar, the on-duty nurse at Clifton House, proposed hiring a private Christian Science nurse to come to the McKown home. Edgar told mother that she would try to have

a Christian Science nurse who took in-home cases call the McKowns.

Edgar subsequently called appellant Quinna Lamb, a journal-listed Christian Science nurse and, at the time, off-duty from Clifton House. Edgar told Lamb about Ian and asked if she was available. Lamb told Edgar that she knew the McKowns and would offer her services to them. Lamb subsequently called mother, who accepted Lamb's offer and hired her to provide home nursing services.

When she arrived at the McKowns' home at about 9:00 p.m., Lamb called Van Horn, notifying him that she was now assisting in Ian's care. This was the third call to Van Horn, and last until after Ian's death. Lamb then commenced caring for Ian and reading hymnals to him. Throughout the evening, mother and Lamb also contacted Tosto by telephone concerning Ian's worsening condition. Although he assisted mother and Lamb in caring for Ian earlier in the evening, William McKown went to sleep about 11:00 p.m.

At approximately 2:36 a.m. on May 9 (day four), Ian died.

Kathleen and William McKown were subsequently charged with second degree criminal manslaughter. The district court dismissed the indictments, however, and this court and the Minnesota Supreme Court affirmed in *State v. McKown*, 461 N.W.2d 720 (Minn.App.1990), *aff'd*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992).

In April 1991, respondent Douglass G. Lundman, Ian's natural father, was appointed trustee of Ian's estate and commenced this wrongful death action on behalf of himself and Ian's older sister Whitney. Lundman filed suit against the appellants: William and Kathleen McKown; Quinna Lamb; Mario Tosto; James Van Horn; Clifton House, Inc.; and The First Church of Christ, Scientist. The complaint alleged, among other things, negligence in failing to provide, obtain, or recommend medical treatment for Ian.

Following a seven-week trial in July and August 1993, the jury returned a special verdict finding all appellants negligent and dividing liability as follows: Kathleen McKown, 25 percent; William McKown, 10 percent; Tosto, 10 percent; Lamb, 5 percent; Clifton House, 20 percent; Van Horn, 20 percent; and First Church, 10 percent. After awarding $5.2 million in compensatory damages, the jury, in a separate proceeding against the church alone, awarded $9 million in punitive damages.

Appellants moved for J.N.O.V., a new trial, or remittitur of damages. The trial court denied all posttrial motions except for a remittitur of the compensatory damages from $5.2 million to $1.5 million. Judgment was entered and this appeal followed.

ISSUES

I. Is the award of punitive damages for actions based on the teaching of church doctrine unconstitutional?

II. Did this action violate appellants' constitutional rights to freedom of religion or due process?

III. With respect to the negligence issues:

A. Did the trial court legally err in finding a duty of care or in applying the standard of care?

B. Are the jury findings on breach of duty and causation perverse or palpably contrary to the evidence?

IV. With respect to the trial:

A. Did the trial court abuse its discretion and prejudicially err in admitting and excluding evidence?

B. Did the trial court abuse its discretion by allowing improper closing argument?

C. Did the trial court err as a matter of law in instructing the jury?

V. Did the trial court abuse its discretion in ordering remittitur?

ANALYSIS

I.

PUNITIVE DAMAGES

We first address appellant church's challenge to the award of punitive damages.

[1, 2] Punitive damages serve to punish wrongdoers and deter others from similar conduct. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 920 (Minn. 1990). In those instances where deterrence will not be achieved, punitive damages should not be awarded. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 892 (Minn. 1986). Respondent argues that the punitive damages award is a permissible deterrent because it "persuades the First Church not to interfere in the direct care of seriously-ill children."

[3] For three independent reasons we hold that punitive damages may not be imposed. First, there is no evidence that the church directly interfered in Ian's care and insufficient evidence as a matter of law that it interfered by agency through his caregivers. Hence, there is no past *conduct* by the church of the kind justifying punitive damages. The punitive damage award must be reversed on that ground alone.

[4] Second, even were we to recognize an agency relationship, the punitive damages award would still fall because it is unconstitutional, as the church and two amici

assert.[1] They question the constitutionality of imposing punitive damages on a church to force it to abandon teaching its central tenet. We find the argument compelling.

In closing argument in the action for punitive damages, respondent's attorney compared the church's involvement to a weed, arguing:

> I see weeds on the lawn and I can sit there and pick at the surface of weeds all day long, but until you dig underneath and get the root of the weed, the weed will come back again and again and again.

Respondent's attorney explained why respondent sought punitive damages only from the church:

> [I]t is with the First Church that you go below the surface of these policies. If you want to establish a change, if you want to deter and make a difference, it is against the First Church that [a] punitive damage award will make a difference.

As these statements suggest, the main conduct of the church on which the punitive damages award was based is its espousal and promotion of spiritual treatment as a means of care, and

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[1] The Americans United for Separation of Church and State submitted an amicus curiae brief opposing the imposition of punitive damages, as did a group of 11 religious organizations of various denominations.

Two briefs supporting the imposition of punitive damages were submitted by amici curiae representing, first, the Minnesota Trial Lawyers Association, and, second, the American Academy of Pediatrics, the American Medical Association, and the Minnesota chapters of these associations.

Finally, the Minnesota Civil Liberties Union submitted a brief arguing that tort liability is not violative of appellants' right to freedom of religion, and that a standard of care based on a reasonable Christian Scientist standard or Minnesota statutes (if read as absolving of liability) would be an unconstitutional establishment of religion. The Civil Liberties Union did not directly discuss the constitutionality of punitive damages.

on its concomitant failure to train Christian Science practitioners and nurses to perform or seek medical diagnoses.

[5] The church's espousal of spiritual treatment is, however, entitled to substantial free exercise protection. *See Thomas v. Review Bd.*, 450 U.S. 707, 713, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981) (religious beliefs protected by the Free Exercise Clause). The constitutional right to religious freedom includes the authority of churches to independently decide matters of faith and doctrine. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952).

[6] We do not grant churches and religious bodies a categorical exemption from liability for punitive damages. But under these facts, the risk of intruding—through the mechanism of punitive damages—upon the forbidden field of religious freedom is simply too great.

[7] A third, independent reason the punitive damages award must be reversed is that it violates the Minnesota statute on punitive damages. That statute requires "clear and convincing evidence" that the defendant showed a "deliberate disregard" for the rights or safety of others. Minn.Stat. § 549.20, subd. 1(a) (1992). This statutory standard is met where the defendant has "knowledge of facts or intentionally disregards facts that create a high probability of injury" to others *and* the defendant "deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury." *Id.*, subd. 1(b) But,

> [g]ood faith is a proper defense to punitive damages, even though defendants might have been mistaken in their belief that a party was in jeopardy or that their actions were correct.

Peterson v. Sorlien, 299 N.W.2d 123, 129 (Minn.1980), *cert. denied*, 450 U.S. 1031, 101 S.Ct. 1742, 68 L.Ed.2d 227 (1981).

Here, the punitive damages award must be reversed because it is unchallenged that all defendants, including the church, acted in good faith. And there is no "clear and convincing evidence" that the church acted in "deliberate disregard" of Ian's rights. The church's only contact with Ian was when Van Horn told officials of the church in Boston that a Christian Science parent in Minnesota was using spiritual care for her seriously-ill child. Knowledge of illness is insufficient, by itself, to support an award of punitive damages.

We also note that the church teaches its members to "obey" all laws, including the reporting of contagious disease to local authorities. This, too, suggests the church lacked the malice required under Minnesota law for the imposition of punitive damages.

II.

CONSTITUTIONAL ISSUES ON COMPENSATORY DAMAGES

Appellants raise two constitutional challenges to the award of compensatory damages.

A. Freedom of Religion

Appellants first argue that the religious freedoms guaranteed by the Minnesota and United States constitutions preclude an award of compensatory damages.

1. Absolute Freedom of Belief Does Not Extend to Conduct

Appellants generally argue that permitting this case to proceed improperly placed the Christian Science religion on

trial and that allowing the jury to evaluate the reasonableness of appellants' conduct—which conformed to their genuine religious beliefs—amounted to an evaluation of those beliefs.

[8] We disagree. Although one is free to believe what one will, religious freedom ends when one's conduct offends the law by, for example, endangering a child's life. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940) (First Amendment "embraces two concepts—freedom to believe and freedom to act"). Courts have consistently distinguished between the absolute liberty to believe (which the government may not restrict) and the limited liberty to act in furtherance of religious belief (which the government may reasonably restrict). *Eg., United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982) (conflicting religious belief affords no excuse for resisting payment of taxes); *Gillette v. United States*, 401 U.S. 437, 463, 91 S.Ct. 828, 843, 28 L.Ed.2d 168 (1971) (conflicting religious belief affords no excuse for resisting compulsory military service); *Prince v. Massachusetts*, 321 U.S. 158, 171, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944) (conflicting religious belief affords no excuse for violating child labor laws).

In *Reynolds v. United States*, the Supreme Court upheld a Mormon's criminal conviction for polygamy, and stated:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect permit every citizen to become a law unto himself.

98 U.S. 145, 166-67, 25 L.Ed. 244 (1878). Appellants are free to believe what they will—and to teach and preach what

they believe. But, when beliefs lead to conduct, the conduct is subject to regulation. Here, regulation is necessary for the protection of children and appellants' conduct, though rooted in religion, is subject to state regulation.

But even conduct—when religiously driven—enjoys some constitutional protection, so we next evaluate the constitutionality of a tort-liability sanction against appellants' conduct.[2]

2. Balancing Test Applied to Conduct

[9, 10] Minnesota courts balance the state's interest against the actor's free-exercise interest in religious-based conduct. *See Hill-Murray Fed'n of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 865 (Minn. 1992) (retaining compelling state interest balancing test).[3] Where, as here, it is undisputed that the religious belief is sincerely held and that the religious belief would be burdened by the proposed regulation, the balancing test requires proof of a compelling state interest. *Id.* at 866-67. Here, appellants concede that Minnesota has a compelling interest in protecting the welfare of children, and case law supports that conclusion. *See, e.g., In re Hamilton*, 657 S.W.2d 425, 429 (Tenn.Ct.App.1983) (state has compelling interest in chemotherapy for child over parents' religious objections), *appeal denied* (Tenn. Sept. 29, 1983).

There must also be no less-restrictive means to accomplish the state's goal, here to ensure the safety of children.

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[2] The McKowns, Tosto, Lamb, Clifton House and Van Horn all defer to First Church for argument on this issue. And the church concedes that "[t]he state has a compelling interest in protecting the lives of its children when they are seriously ill."

[3] Minnesota's Constitution provides greater protection than does the U.S. Constitution. *Hill-Murray*, 487 N.W.2d at 864-65. Accordingly, we need not discuss federal constitutional law.

Appellants argue that there are less-restrictive alternatives to this civil action, citing the unpublished decision of the Michigan Court of Appeals in *Brown v. Laitner*, No. 73903 (Mich Ct.App. Dec. 17, 1986).

[11] But appellants are bound by Minnesota law, not Michigan law; and the statutes in the two states differ. We do not believe that the Minnesota legislature sought to limit its rights as *parens patriae* by simply exempting spiritual healers from *criminal* child neglect statutes or by exempting Christian Scientists from laws that forbid practicing medicine without a license.

Although we agree that Minnesota statutes include some accommodation to the Christian Science religion, the statutes should not be read as authorizing reliance on prayer as a sole treatment for seriously-ill children under *all* circumstances or (by implication) as proscribing civil lawsuits. The statutes simply indicate the legislature's willingness to tolerate this religious practice—up to a point. We reject appellants' argument that the Minnesota legislature has sanctioned prayer alone to treat a child battling a life-threatening disease.

Appellants also argue that there are two less-restrictive alternatives that would serve Minnesota's interest in protecting children: mandated notice to public authorities when a seriously-ill child is being treated by spiritual means, and criminal prosecution of a custodial parent in case of death.

But the first alternative—a reporting requirement—does not always work and therefore is not a preclusive alternative. *See Hermanson v. State*, 570 So.2d 322, 328-29 (Fla. Dist.Ct.App.1990) (seven-year-old diabetic died in spite of Florida's criminally sanctioned reporting requirements), *rev'd*, 604 So.2d 775 (Fla.1992); *see also Walker v. Superior Court*, 47 Cal.3d 112, 253 Cal.Rptr. 1, 763 P.2d 852, 871 (1988) (authorities generally will not learn of faith healing unless and until someone dies), *cert. denied*, 491 U.S. 905, 109 S.Ct. 3186, 105 L.Ed.2d 695 (1989).

Likewise, criminal liability is not a preclusive less-restrictive alternative because it is fallible and requires that the state, rather than private parties, expend resources to bring forth a corrective response.

[12, 13] It is appropriate that disputes involving the consequences of religious-based conduct be brought before the civil courts where, as here, the underlying lawsuit is not a vehicle for attacking religious belief. *See Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 811 (Minn.App.1992) (permitting litigation of child sexual abuse claims against church), *pet. for rev. denied* (Minn. May 24, 1992); *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn.App.1991) (permitting litigation of sexual harassment claim against church), *pet. for rev. denied* (Minn. Aug. 29, 1991). We rule that the trial court could adjudicate this action without offending the right to free exercise of religion.[4]

B. Due Process

[14] Appellants next argue that this action for compensatory damages should be dismissed based on *State v. McKown (McKown I)*, which held that a criminal prosecution violated the McKown's constitutional rights of due process notice. 475 N.W.2d 63, 68-69 (Minn.1991).

McKown I turned entirely on whether an exception in the child neglect statute effectively caused the criminal manslaughter statute to fall short of satisfying "the fair notice requirement inherent to the concept of due process." *Id.* at 68. But this is a civil action based on common-law

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[4] We are, of course, mindful of the clearly forbidden entanglement that occurs if courts are used to "pursue" religious "error," or to conduct attacks on firmly held religious beliefs. But religious error is not at issue here, and this case is not a mask for religious persecution. The salient inquiry is into common law negligence, with appellants' religious beliefs playing a critical role.

negligence, and any confusion on what appellants could or could not lawfully do without being subject to *civil liability* is of much less force than uncertainty as to what they could or could not do before being subject to criminal prosecution. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982) (courts have a "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe").

It is significant also that this case is based on common law negligence, as distinguished from a claim created by the legislature. The common law derives its authority solely from custom and use; it originates as courts recognize, affirm, and enforce such customs and uses. *See Kansas v. Colorado*, 206 U.S. 46, 96-97, 27 S.Ct. 655, 667, 51 L.Ed. 956 (1907) (courts establish principles of common law). As a product of the courts, the common law has developed case by case in response to social needs; the common law has evolved gradually as society has changed and new rights have been recognized. *Sullivan v. Minneapolis & Rainy River Ry.*, 121 Minn. 488, 494-95, 142 N.W. 3, 5 (1913). Our decision today is simply one more effort to ascertain and apply what is just.

It should not be a surprise when a rule of common law is first applied retrospectively as, to a degree, we do in this case. That the rights awarded and obligations imposed in this case may not have been perfectly perceived yesterday is of little constitutional concern. Even if some rights and obligations were recognized here for the first time, we would still have no concern about constitutionality. *See Miller v. Monsen*, 228 Minn. 400, 406, 37 N.W.2d 543, 547 (1949) (common law principles "are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require").

There is, however, substantial precedent for overriding religious belief in matters of health—and liability should have

been foreseen. *See, e.g., Jehovah's Witnesses v. King County Hosp. Unit No. 1 (Harborview)*, 278 F.Supp. 488, 508 (W.D.Wash.1967) (appointing guardians for children to provide medical care consent), *aff'd per curiam*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968); *Hamilton*, 657 S.W.2d at 429 (allowing chemotherapy over parent's religious objections); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053, 1066 (1978) (affirming order for continuation of chemotherapy); *In re Sampson*, 29 N.Y.2d 900, 328 N.Y.S.2d 686, 687, 278 N.E.2d 918, 919 (1972) (per curiam) (authorizing surgery, including blood transfusions, to correct non-life-threatening physical impairment notwithstanding parental religious objections).

The due process requirement of fair notice has not been violated.

III.

SUBSTANTIVE ISSUES RELATING TO NEGLIGENCE

[15] The basic elements of a negligence claim are (1) the existence of a duty, (2) breach of that duty, (3) injury proximately caused by the breach, and (4) damages. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn.1990). Appellants challenge the existence of a duty of care and a breach of that duty.

A. Duty of Care

[16] Where the facts are not in controversy, the existence of duty is a question of law. *Carlson v. Mutual Serv. Ins.*, 494 N.W.2d 885, 887-88 (Minn.1993).

[17-19] Generally, there is a duty to aid another only if a "special relationship" exists between the parties. *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn.1993). A special relationship exists where one party has custody of another under circumstances that deprive the other of normal opportunities of self-protection. *Id.* That is,

> "the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare."

Id. at 474 n. 2 (quoting W. Page Keeton et al., *Prosser and Keeton on the Laws of Torts* § 56, at 374 (5th ed. 1984)). A special relationship may also arise where one accepts responsibility to protect another, although there was no initial duty. *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570 (Minn. 1979).

[20] Kathleen McKown does not dispute that she owed a duty of care to her son. A custodial parent has a special relationship to a dependent and vulnerable child that gives rise to duty to protect the child from harm. *Delgado v. Lohmar*, 289 N.W.2d 479, 483-84 (Minn.1979). The other appellants argue, however, that they had no duty of care and that the trial court erred as a matter of law in holding that they each had special relationships with Ian. We examine the duty of each of these appellants separately.

1. William McKown

[21] William McKown argues that he owed no legal duty to Ian because he was a stepparent and because Kathleen McKown was solely responsible for making decisions about Ian's health care. Although we recognize that, as a stepparent, William McKown usually had no "final word" control over Ian's health care, we disagree that his relationship as a stepparent did not impose a duty of care.

The record indicates that William McKown acted consistent with a special relationship existing between Ian and him. During Ian's last days, William McKown was fully aware of the gravity of Ian's condition, was frequently present as an on-the-scene caregiver, and attempted to assist Ian in several ways. He made telephone calls on Ian's behalf—calling Van Horn, when he feared Ian might be suffering from a contagious disease, and Clifton House, when Ian was unable to drink liquids or eat food. Because Ian could not walk or talk, William McKown carried Ian from his bed to the table in an attempt to offer him food and liquid (as suggested by Clifton House) and companionship. Finally, although he did not remain awake through the night when Ian died, William McKown testified that he spent most of that evening "in the doorway [to Ian's room] making sure I could be summoned for help, if necessary." These facts support the finding that William McKown knew of Ian's helplessness and the gravity of his situation, that he accepted a responsibility to protect Ian, and that a special relationship existed between the two.

[22] Independent of William McKown's conduct during Ian's final illness, we believe there also is a presumption that "custodial" stepparents (and "visitation" stepparents during visitation) assume special-relationship duties to stepchildren. *See London Guar. & Accident v. Smith*, 242 Minn. 211, 215, 64 N.W.2d 781, 784 (1954) (stepparent who assumes obligations incident to parental relation assumes parental status and an obligation to discharge parental duties); *see also Simmons v. Simmons*, 486 N.W.2d 788, 791 (Minn.App.1992) (discussing stepparent's right to visitation). The partnership involved in marriage is presumed to extend to care of children, absent some most unusual disclaimer. *See Iowa ex rel. Gilman v. Bacon*, 91 N.W.2d 395, 399 (Iowa 1958) (one merely standing in place of parent may disclaim child care responsibilities at any time). There was no disclaimer in this case.

This special relationship may, to a significant extent, be viewed as a responsibility delegated to him by, or subject to veto by, Kathleen McKown. But even so, he could not hide behind the natural parent. Regardless of who had ultimate authority in overseeing Ian's care, William McKown, bearing an in loco parentis responsibility for Ian's well-being, was obligated to put Ian's interests first—above and beyond Kathleen McKown's interest in exercising her religious beliefs.

Our holding is not intended to affect the legal responsibilities of stepparents to their stepchildren in different factual situations. Rather, our recognition of a duty is based on our conclusion that a stepparent may not avoid responsibility by simply pointing to the natural parent and proclaiming that the parent had legal control over and full responsibility for the child.

Here, the law required that William McKown step forward to rescue Ian.

2. Quinna Lamb

[23] Appellant Quinna Lamb, the Christian Science nurse hired by Kathleen McKown to care for Ian in the McKown home, argues that she did not have a duty of care.

We disagree. Both indicia of a "special relationship" apply: Lamb had significant "custody or control" of Ian under circumstances where Ian lacked even his limited minor's capacity for self-protection—that is why mother hired Lamb—and she accepted the responsibility to care for Ian and to protect him by providing professional services in return for cash wages.

When she arrived, Lamb found Ian lying in his own urine, unable to walk, talk, or breath normally.[5] Lamb immediately

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[5] Lamb's notes on the night of Ian Lundman's death indicate her knowledge of Ian's grave condition:

began providing Christian Science nursing services: she read hymns and prayers to Ian, comforted him, cleaned him and his bedding, and attended to his physical care during the final critical hours of his life. During a good part of her involvement, though it was brief, a telephone call to involve a provider of conventional medical care would likely have led to the administration of insulin and would likely have saved Ian's life.

Lamb argues against finding a duty because advising medical treatment is antithetical to Christian Science nursing, which was what she was hired to provide. But in other situations Christian Scientists are instructed to cooperate with public officials—even when that cooperation runs contrary to Christian Science doctrine. Specifically, Christian Scientists have been instructed, ever since founder Mary Baker Eddy

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9:00 p.m.—Arrived. Boy had urinated—prepared bed—dad carried—light e.c. [evening care] p.c. (patient care] given—P[atient] had juice earlier—eyes rolled back—P[atient] awakened when moved—seemed aware of people—breathing labored.
10:10—siphoned water.
10:50—turned P[atient] onto R[ight side]—siphoned water.
11:15—Pract[itioner Tosto] called—report given—onto back.
11:30—P[atient] vomiting brownish fluid—called Pract[itioner]—vomiting ceased.
12:30—labored breathing.
12:50—moistened lips [with] Vaseline—P[atient] wet—p.c. [patient care] given.
1:00—P[atient] swallowing-facial spasms—called Pract[itioner]—report given.
1:05—immediate [change]— symptoms gone—labored breathing.
2:05—taking big breaths every other breath, gritting teeth.
2:10—called Pract[itioner]—report shallow, irregular breathing—eyes fixed.
2:20—called Pract[itioner]—P[atient] color white—passing possible.
2:36—P[atient] stopped breathing.
2:50—N[urse] called Pract[itioner].
3:02—husband called 911/M.E. [medical examiner] and C.O.P. [Van Horn].

wrote on the question, to promptly notify local health officials whenever they know or have reason to believe that an individual has a communicable disease and "the law so requires."

Indeed, one Christian Science manual can be read to imply that situations may arise where medical treatment may be required. Christian Science parents are warned of limitations on their right to impose Christian Science care on their children:

> The rights of Christian Scientists to select Christian Science treatment for their children in lieu of medical treatment will continue to be respected by public officials so long as [the officials] are assured that *effective* care is being given our children.

Christian Science Comm. on Publication for Minnesota, *Legal Rights and Obligations of Christian Scientists in Minnesota* 5 (1976) (emphasis added). Conversely, therefore, Christian Science parents are at least warned that their right to withhold conventional medical treatment is not absolute; parents are warned that when officials are not confident that effective care is being given, the right to select Christian Science treatment may end. That advice—or warning—logically extends beyond parents. Ian's situation was an instance where Christian Science professionals should have been aware of the requirement that they yield to the law of the community. We reject Lamb's argument that she had no professional duty except to persist in following pure Christian Science doctrine.

[24] We also reject Lamb's argument that she is exempt from civil liability because the mother controlled what type of care Ian would receive. Lamb was alone with Ian from 1:00 until 2:00 a.m. while Kathleen McKown slept, and Lamb also held herself out as a professional Christian Science nurse with special training, skill, and experience in caring for others (albeit through Christian Science means). Regardless of who had ultimate authority in overseeing Ian's care, Lamb was

obligated during her engagement to make Ian's welfare her paramount interest; she could not yield to a parent's directions; protecting a child's life transcends any interest a parent may have in exercising religious beliefs. Furthermore, Lamb's argument fails because William and Kathleen McKown, too, were required to abandon the unlawful stance that Lamb now claims they imposed on her.

[25] In the common law tradition, our holding today serves as notice to all professional Christian Science caregivers—be they practitioners, nurses, or others—that they cannot successfully disavow their professional duty to a child by deferring to the parent as the ultimate decision-making authority.

3. Mario Tosto

[26] Appellant Mario Tosto, the practitioner hired by Kathleen McKown to pray for Ian, generally argues that he did not owe a duty to Ian beyond Christian Science prayer for Ian's recovery (something he did from his own home).

Again, we disagree, and affirm the trial court conclusion that Tosto owed a broader duty to Ian. Tosto, though he had no initial duty to Ian, accepted a responsibility to serve Ian and thereafter, through conversations with mother and nurse, held considerable power over Ian's welfare. Tosto was hired and paid $446 by the McKowns to play a professional and pivotal role in caring for Ian. The evidence indicates mother turned to Tosto for guidance throughout the final stage of Ian's illness. Tosto also assumed responsibility for Ian and was continuously in contact with the on-scene caregivers from day two (when he was hired) until the last moments before Ian's death, early on day four. Hence, Tosto accepted a professional's responsibility for Ian's health care. Tosto was compelled to make Ian's welfare his dominant interest.

[27] We emphasize that the law required Tosto—as a trained Christian Science practitioner—to temper his use of Christian Science health care to conform his actions to the law of the community. Christian Science teachings direct him to follow the tenets of the religion, but, as a health-care provider, he is also required to yield to civil authority "when the law so requires."

Tosto argues that his control of Ian's care was subject to Kathleen McKown's ultimate authority. He argues that he was engaged by her only for Christian Science care, and that it runs counter to Christian Science teachings to acknowledge the need for medical care or to call for such care. But like Lamb, he could not hide behind mother. He had a responsibility on these facts to acknowledge that Christian Science care was not succeeding and to persuade mother to call in providers of conventional medicine or, persuasion failing, to override her and personally call for either a doctor or the authorities.[6]

4. James Van Horn

[28] Appellant James Van Horn, the one-man Minnesota committee to protect Christian Science doctrines and practice from attack, argues that he did not have a special relationship because his only connection with Ian was his knowledge that Ian was ill. We agree and reverse the jury verdict and trial court holding that Van Horn had a legal duty toward Ian.

Although three telephone calls made Van Horn aware of Ian's illness, these calls were not sufficient, individually or cumulatively, to create a special relationship. Mother first called Van Horn on May 8—the day before Ian died—and

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[6] Pursuant to Minn.Stat. § 260.165, subd. 1 (1992), a child may be taken into immediate custody by court order or by a peace officer that finds a child in a situation which the "officer reasonably believes will endanger the child's health or welfare."

reported that Ian was ill. The second call came later that day when William McKown called Van Horn for telephone numbers of state health officials. During the call, William McKown told Van Horn that he feared Ian might have an aggressive contagious disease, and that he wanted to alert public health officials. Finally, when Quinna Lamb arrived at the McKowns' home approximately five hours before Ian died, she called Van Horn.

The calls suggest that Van Horn may have been substantially aware of the seriousness of Ian's illness—as demonstrated by the fact that Van Horn himself contacted church officials in Boston to notify them of the case—yet neither of the two definitions of a "special relationship" applies: Van Horn never accepted "power" over Ian's care, and he never assumed a responsibility to protect Ian. Rather, after learning that Kathleen and William McKown wanted Christian Science care, he asked that a professional be called (as Tosto was) to provide that care, demonstrating that he declined any personal obligation he might otherwise have assumed to provide that care.

Any duty he had ran to his employer, the church, not to Ian. As the Minnesota Committee on Publication, Van Horn generally had two distinct responsibilities: (1) assisting the national Committee on Publication in correcting "impositions" on or "injustices" to the Christian Science religion by media, and (2) consulting with Christian Scientists with respect to their legal rights and obligations. One Christian Science publication describes Van Horn's job as follows:

> [T]he Committees on Publication all over the world assist in protecting the rights of Christian Scientists under the laws of their states or countries against abridgments by persons exercising public authority, whether it be executive, judicial, or legislative, but in each case their efforts are directed toward the protection of the Cause of Christian Science.

Christian Science Comm. on Publication for Minnesota, *Legal Rights and Obligations of Christian Scientists in Minnesota* iv (1976). The position of the Committee on Publication does not include a duty of care toward individual Christian Scientists.

Further, Van Horn did not assume a duty to oversee the caregivers. And, unlike Mario Tosto, he was neither in steady contact with the on-scene caregivers nor hired to pray for Ian.[7] Mere knowledge of an illness, without either an assumed obligation of care or prior relationship, is insufficient to create a special relationship. We accordingly reverse the trial court's decision that Van Horn had a duty toward Ian. To base duty on mere knowledge coupled with power would implicate neighbors, grandparents, and friends.

We note the compelling temptation to hold Van Horn liable solely on the ground that he *could have* suggested medical treatment at any time (especially during one of the three telephone calls made to him), and that if he had suggested medical care to the McKowns or Lamb his advice would likely have been heeded.

But the imposition of negligence liability must be preceded by a legal duty; the fact that Van Horn failed to suggest medical care is irrelevant unless it is first established that he had a duty to suggest that care. To impose a duty solely because Van Horn could have (with effect) suggested medical care reduces the question of negligence into a "but for" causation test: whether or not Van Horn held Ian's life in his hands. The Minnesota Supreme Court has rejected this reasoning, however, as something that "distorts the basic tort concept of duty." *Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn.1994). We observe again that the "but for" test would implicate neighbors and friends.

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[7] See Lamb's notes, reproduced supra note 5, for a comparison of Tosto's role during the last hours of Ian's life.

5. Clifton House

[29] Respondent argues that appellant Clifton House, Inc., a nonprofit corporation that operates a Christian Science nursing facility accredited by the First Church, assumed a duty to care for Ian because (1) it rendered "advice over the telephone in [a] medical setting," and (2) the jury found that Clifton House "sent" Quinna Lamb, who acted as its agent, to care for Ian. We disagree and reverse because the evidence is insufficient to support the jury's finding of agency; hence the trial court's conclusion that Clifton House assumed a duty toward Ian also fails.

The facts present an insufficient basis for a duty of care. Several telephone calls were made to the nursing home in connection with Ian's illness, but the nursing home never assumed "considerable power" over Ian's welfare. And there is no evidence that the nursing home accepted any professional responsibility to serve Ian; it simply—without compensation—provided suggestions for care, in contrast to Lamb and Tosto, the professionals who were hired to actually care for Ian on an on-going basis.

Respondent, to support his argument that Clifton House assumed a duty by providing free nutritional advice over the phone, cites *Grondahl v. Bulluck*, 318 N.W.2d 240 (Minn. 1982). But *Grondahl* does not discuss whether a duty is assumed or a special relationship is created based on telephone calls for health care advice; *Grondahl*, rather, concerned only a statute-of-limitations issue in a medical malpractice case involving a long-established physician-patient relationship where the physician used the telephone to communicate with his patient (though not in accord with professional standards). *Id.* at 241-42.

[30] Respondent also argues that Clifton House owed a duty to Ian because the jury found that Clifton House had sent

Lamb—as its agent—to care for Ian. But the jury's finding of a principal-agent relationship between Clifton House and Lamb is without evidentiary support and is erroneous as a matter of law.

[31] Whether an agency relationship exists is generally a question for the jury, unless the evidence is conclusive. *See PMH Properties v. Nichols*, 263 N.W.2d 799, 802 (Minn.1978) (existence of agency is question of fact). Here, by special verdict the jury found that an agency existed between Clifton House and Lamb. On review of a special verdict, the answers to a question will not be set aside unless they are

> perverse and palpably contrary to the evidence or where the evidence is so clear [as] to leave no room for differences among reasonable people. The evidence must be viewed in a light most favorable to the jury verdict. If the jury's special verdict finding can be reconciled on any theory, the verdict will not be disturbed.

Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302, 309 (Minn.App.1992) (citations omitted), *pet. for rev. denied* (Minn. Feb. 12, 1993).

The jury finding of an agency relationship between Lamb and Clifton House is perverse and contrary to the evidence because Clifton House did not have a right to control Lamb's actions. *See Jurek v. Thompson*, 308 Minn. 191, 198, 241 N.W.2d 788, 791 (1976) (rejecting jury's finding of agency where evidence of "defendant's right of control * * * is totally lacking") (citing Restatement (Second) of Agency § 1, cmt. b).

Even if, as the jury apparently believed, Clifton House "sent" Lamb, it is also clear that Lamb was free to decline the referral; Lamb called the McKowns herself and after she was engaged there were no further communications between Clifton House and either the McKowns or Lamb. The agency theory fails because there is no evidence that Clifton House made a "manifestation" that Lamb was acting on its behalf, nor

is there any evidence that Clifton House had the right to control Lamb's actions or conduct. *See PMH Properties*, 263 N.W.2d at 802 (agency requires both manifestation by principal that agent is acting on its behalf, and a light of principal to control agent).

Finally, the nursing home had no financial relationship relating to Ian's care (the McKowns paid Lamb $79 for her services directly, not through Clifton House). We reverse the trial court's conclusion that Clifton House assumed a duty toward Ian.

6. First Church

[32] Following special jury verdicts that Tosto and Lamb were "agents of the church," and that their acts were "authorized by the church," the trial court ruled that the church, as principal, owed a duty toward Ian.[8]

As the church concedes, its Christian Science publications certainly "inspired Kathy to care for Ian as she did." But there is no evidence supporting a finding that the church acted as principal to Tosto or Lamb—there was never any agreement between them that manifested either consent or a right of control. *See Jurek*, 241 N.W.2d at 793 (agency requires persuasive evidence of affirmative manifestation of control or fiduciary relationship).

Respondent asserts that the jury properly found that the church's agency relationship arises from listing Tosto and Lamb in a Christian Science publication—that this listing was

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[8] The jury also found that Van Horn was an "agent of the church," and that the church, as Van Horn's principal, owed a duty toward Ian. Van Horn's acts may have been "authorized by the church," but, because we hold that Van Horn never held a special relationship with Ian, the alleged agency relationship between Van Horn and the First Church does not provide a sufficient basis to hold that the church had a duty of care toward Ian.

a "certification" by First Church that the individual had met the church's requirements to qualify as nurse and practitioner (listing is limited to approved nurses and practitioners). But we decline to affirm a jury's finding of agency based purely on advertisements in a journal published by the alleged principal, even if advertisers are screened. "Seals of approval" do not create agencies.

There simply was no evidence that the church had a right to *control* the means and manner of Tosto's and Lamb's performances in caring for Ian beyond that approved advertisement and the control derived from their acceptance of the religious doctrine espoused by the church.

> The law is clear that an agency relationship does not exist unless there are facts showing that the alleged principal had the right to control the agent's conduct *in performing the services.*

Vieths v. Ripley, 295 N.W.2d 659, 664 (Minn. 1980) (emphasis added). We hold, therefore, that the jury could not lawfully find that First Church was a principal in an agency relationship relating to Ian's care; the trial court erred in imputing a duty of care to the church. To rule otherwise would make too much of the consequences of the church's adherence to and promotion of its core tenet.

[33] Like the temptation to hold Van Horn liable because he *could have* suggested medical treatment—and saved Ian's life—there is a temptation to hold the church liable on the ground that it could have instructed its Christian Science nurses, practitioners, and followers to suggest medical care when the life of a child is threatened by continued reliance on spiritual care. But, again, that is putting the cart before the horse; mere power is not sufficient for the imposition of a duty. And duty is a prerequisite to a finding of negligence.

[34] Finally, a church is not a lawn-mower manufacturer that can be found negligent in a products liability case for failing to affix a warning sticker near the blades. As

previously noted, the constitutional right to religious freedom includes the authority of churches—not courts—to independently decide matters of faith and doctrine, and for a church as an institution to believe and speak what it will. When it comes to restraining religious *conduct*, it is the obligation of the state, not a church and its agents, to impose and communicate the necessary limitations—to attach the warning sticker. A church always remains free to espouse whatever r*eligious belief* it chooses; it is the *practices of its adherents* that may be subject to state sanctions.

Again, even bearing in mind that the jury's finding of an agency relationship must be affirmed unless it is "perverse and palpably contrary to the evidence," we reverse the finding that the First Church assumed a duty to care for Ian based on the role of its purported agents.

B. Standard of Care

[35] The second element of negligence challenged by appellants is whether the individual defendants breached their respective duties of care. We examine this question only in relation to the appellants who had a duty of care.

Those appellants first assert that two statutes found relevant in deciding *McKown I*—Minn.Stat. §§ 609.378 (1988) and 626.556 (Supp.1989)—"officially authorize" spiritual treatment "in all circumstances." Appellants also rely on the unpublished holding of the Michigan Court of Appeals in *Brown v. Laitner*, No. 73903 (Mich.Ct.App. Dec. 17, 1986).

But *Brown* does not discuss the relevant standard of care for Christian Science caregivers. And neither statute at issue in *McKown I* suggests a standard of care to be followed. *See Valtakis v. Putnam*, 504 N.W.2d 264, 266-67

(Minn.App.1993) (Minn. Stat. § 626.556 does not establish civil standard of care).[9]

Even if one of the statutes established a standard of care, that standard would not necessarily apply to this negligence action. *See Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, 49, 226 N.W.2d 110, 115 (1975) ("[T]he fact that a person * * * has complied with a statute or ordinance regulating conduct under the circumstances is not conclusive that he was in the exercise of due care."). We note again that the relevance of these statutes in *McKown I* arose from the due process notice issue, not from a determination that either

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[9] Minn.Stat. § 609.378, subd. 1 (1988), provides in relevant part:

> A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and which deprivation substantially harms the child's physical or emotional health * * * is guilty of neglect of a child. * * * If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care" as used in [this] clause.

The relevant part of Minn.Stat. 626.556, subd 2(c) (Supp.1989), provides:

> "Neglect" means failure to supply a child with necessary food, clothing, shelter or medical care * * * or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health. * * * Nothing in this section shall be construed to mean that a child is neglected solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child in lieu of medical care; except that there is a duty to report if a lack of medical care may cause imminent and serious danger to the child's health. This section does not impose upon persons, not otherwise legally responsible for providing a child with necessary food, clothing, shelter, or medical care, a duty to provide that care.

statute ratified reliance on Christian Science treatment during Ian's final illness.

We reject appellants' argument that the standard of care here is derived from either section 609.378 or section 626.556.

[36] Tosto and Lamb also argue that, if a statutory standard does not apply, then the proper standard is that of a "reasonable Christian Science professional." They argue that the trial court erred as a matter of law in applying the "reasonable person" standard of care. Tosto and Lamb first cite *Baumgartner v. First Church of Christ, Scientist*, 141 Ill.App.3d 898, 96 Ill.Dec. 114, 490 N.E.2d 1319 (1986), *appeal denied* (Ill. June 3, 1986), *cert. denied*, 479 U.S. 915, 107 S.Ct. 317, 93 L.Ed.2d 290 (1986). But *Baumgartner* concerned an adult decedent who chose to undergo Christian Science treatment, while Ian was an 11-year-old child. The *Baumgartner* court based its decision on Illinois case law that gives *competent adults* the constitutional right "to refuse medical treatment when it conflicts with * * * religious beliefs." *Id.*, 96 Ill.Dec. at 121, 490 N.E.2d at 1326.

Appellants also point to text in *Baumgartner* regarding what standard of care applied to a Christian Science practitioner in adjudicating a medical malpractice claim. But this is not a malpractice claim. And here, in contrast to *Baumgartner*, we must take account of a public-duty limitation on the reasonable Christian Science practitioner, a limitation that arises from concern for a child.

Lamb and Tosto also cite *Spead v. Tomlinson*, 73 N.H. 46, 59 A. 376 (N.H.1904), in support of applying a "reasonable Christian Science professional" standard. In *Spead*, the plaintiff sued a Christian Scientist "healer" who failed to cure her appendicitis, claiming negligence and deceit. *Id.*, 59 A. at 377. The New Hampshire Supreme Court held that the standard of care was that "of the ordinary Christian Scientist

who undertakes to treat diseases according to the methods practiced by such healers." *Id.*

But *Spead*, like *Baumgartner*, involves an adult plaintiff who specifically contracted with a Christian Scientist caregiver—knowing that the treatment was to be different from ordinary medical care. *Id.*, 59 A. at 378. Here, in contrast, Ian, a child, never contracted with the Christian Scientist practitioners. The following passage in *Spead* is particularly relevant:

> Had [the plaintiff] been an infant, non compos, or had never assented to Christian Science treatment, then the question [of] whether the practice of Christian Science * * * is so contrary to common sense and reason that it would be negligent * * * might be open to consideration by a jury. But being a person of mature years, and having sought such treatment, she cannot now complain.

Id. Accordingly, the cases cited to support appellants' argument for the imposition of a "pure" Christian Scientist standard of care are not persuasive.

We nonetheless agree with appellants that to apply the standard of care of a reasonable person, while not taking account of religious belief, is inappropriate under the facts presented. Our conclusion is based on our recognition that an individual's right to religious autonomy is a core ideal of both the state and federal constitutions; we must defend the right of any citizen to hold whatever religious beliefs he or she may choose. This is especially true where, as here, the undisputed facts demonstrate that appellants genuinely believed that Christian Science care was appropriate in treating Ian.

But appellants' *personal* rights to freely practice religion are not the only rights to be considered. It is crucial to distinguish between an adult's right to practice religion by refusing medical treatment for his or her own illness and the right to practice religion by refusing to seek or provide

medical treatment for another person—especially when the other person is a child. As stated by the United States Supreme Court in *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944):

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Although *Prince* did not involve the use of spiritual prayer to care for a child (it concerned the use of a nine-year-old girl to sell religious magazines in violation of child labor laws), its reasoning applies, and its language is hauntingly relevant.

[37] To grant appellants an outright exemption from negligence liability based on their religious beliefs would insulate Christian Scientists from tort liability in cases involving children; we will not embrace a negligence standard that would ignore the rights of Ian Lundman. The right to hold one's own religious beliefs cannot include the right to persist to act in conformity with those beliefs to the point of imminent danger to a child. So, though we apply a standard of care taking account of "good-faith Christian Scientist" beliefs, rather than an unqualified "reasonable person standard," we hold that reasonable Christian Science care is circumscribed by an obligation to take the state's (and child's) side in the tension between the child's welfare and the parents' freedom to rely on spiritual care.

[38] A parent may exercise genuinely held religious beliefs. But the resulting conduct, though motivated by religious belief, must yield when—judged by accepted medical practice—it jeopardizes the life of a child. Religious practices must bend to the state's interest in protecting the welfare of a child whenever the child might die without the intervention of conventional medicine.

We note that this circumscribed qualification on the reasonable person standard of care is easier stated than applied; slippery-slope concerns arise. Questions will be raised regarding the age at which a child may free others of responsibility to turn to conventional medicine, how ill a child must be before conventional medicine must be called on, how to deal with serious but less than life-threatening illness, and how to deal with an adult deprived of the capacity to choose. We decline to draw any bright-line rules. Our decision is based on the specific facts presented in this case (and generally undisputed by the parties): that the patient was a child, and that the defendants had a genuine, good-faith belief in their religion. Under these facts, a reasonable person—who is a good-faith Christian Scientist—standard of care applies to appellants' actions in caring for Ian. But under that standard, when the Christian Scientist appellants were put to a choice between fidelity to religious belief or serious injury and potential death to the child—judged by the law's general acceptance of conventional medicine—the child's right to life prevails.

C. Breach and Causation

[39] We next examine whether the evidence demonstrates that appellants failed to follow the reasonable person standard of care where the accommodation to their Christian Scientist beliefs is circumscribed by the limitation described above. This is normally a question for the jury. *Steffey v. Soo Line R.R.*, 498 N.W.2d 304, 308 (Minn.App.1993), *pet. for rev. denied* (Minn. May 28, 1993).

Here, the jury, applying the ordinary reasonable person standard of care, found that Kathleen and William McKown, Mario Tosto, and Quinna Lamb failed to act reasonably in caring for Ian, and that their breaches of duty caused Ian's death. But, as demonstrated above, the proper standard of

care must take account of the appellants' reasonable Christian Scientist beliefs.

Typically, a remand would be required to allow the trier-of-fact to determine whether the individuals breached this more precisely described standard of care and to determine causation. But a remand is not necessary where, as here, the undisputed facts demonstrate as a matter of law that appellants breached the standard of care of a *reasonable* Christian Scientist, a standard that on these facts required a turn to conventional medicine, and that their negligence caused Ian's death. *See Steffey*, 498 N.W.2d at 308 (question of negligence not for jury where facts undisputed and finder-of-fact could reach only one conclusion).

The undisputed facts show that Ian's caregivers failed to seek medical help in the three days leading to his death, despite continuous and dramatic indications that Ian was ill with a life-threatening disease—first seriously, then gravely—and that he would die, given continued reliance on Christian Science prayer. The undisputed facts indicate that appellants had no lawful choice but to seek medical help.

We hold as a matter of law, therefore, that the four duty-bound defendants breached the standard of care for a reasonable Christian Scientist, who was obligated—with knowledge of a child's grave illness—to seek the assistance of conventional medicine. Further, their separate breaches of duty proximately caused Ian's death.

IV.

TRIAL ERRORS

Appellants argue that the trial court committed material errors in ruling on evidentiary matters, failing to remedy prejudicial closing argument, and instructing the jury.

Appellants argue that the separate and cumulative effect of the errors deprived them of a fair trial.

A. Evidentiary and Other Trial Errors

[40] Rulings on evidentiary matters and the conduct of trial are left to the discretion of the trial court and will not be reversed absent an abuse of discretion. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 725 (Minn.1983). Further, a new trial will be granted only if the errors resulted in prejudice to the complaining party. *Ramfjord v. Sullivan*, 301 Minn. 238, 251, 222 N.W.2d 541, 549 (1974).

1. Privilege

Appellants first argue that the trial court improperly allowed Lundman to testify over Kathleen McKown's marital-privilege objection, and to permit Lundman to call Kathleen and William McKown as witnesses.

[41-43] A party spouse may assert the marital privilege to bar a witness spouse from testifying. Minn.Stat. § 595.02, subd. 1(a) (1992). But the privilege should be narrowly construed so as not to interfere with the process of determining truth. *State v. Hanmuksela*, 452 N.W.2d 668, 676 (Minn. 1990). And in each instance, courts should determine the validity of the privilege by considering whether the testimony will actually be adverse. *United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984) (denying marital privilege where questions posed to defendant wife were not adverse to defendant husband). The testimony here was in no instance adverse to the non-testifying spouse; the trial court did not abuse its discretion in allowing non-adverse spousal testimony.

[44] Appellants also argue that the trial court violated the clergy privilege by permitting practitioner Tosto to be examined about his conversations with Kathleen McKown and

Ian. Minnesota law prevents a member of the clergy from being examined as to any communication made "by any person seeking religious or spiritual advice, aid, or comfort" without the person's consent. Minn.Stat. § 595.02, subd. 1(c) (1992). But the only testimony objected to here concerned why Tosto did not pray for Ian in Ian's presence. The privilege does not apply here because there was no question asked regarding a communication. *See State v. Black*, 291 N.W.2d 208, 216 (Minn.1980) (implicit requirement of clergy privilege is that *communications* were made with expectation that they would be confidential).

2. Postmortem Photographs

[45,46] Appellants challenge the admission of postmortem photographs of Ian, arguing they are unfairly prejudicial. But the mere fact the photographs are graphic is not an adequate reason to exclude them from trial. *State v. Sullivan*, 502 N.W.2d 200, 202 (Minn.1993). Respondent also contends the photographs were admitted without adequate foundation. But proper foundation was based on a police officer's testimony that the photographs accurately depicted how Ian looked minutes after he arrived on the scene, and based also on the testimony of Dr. Donnell Etzeiler that the photographs reflected how a child with juvenile-onset diabetes would appear.

3. Depression Medication

[47, 48] The next of kin of a decedent in a wrongful death case may not recover for emotional distress or suffering. *Fussner v. Andert*, 261 Minn. 347, 359, 113 N.W.2d 355, 363 (1961). Appellants, therefore, argue that the trial court erred by permitting testimony that respondent was taking medication for depression. But the trial court did not abuse its discretion

in admitting testimony offered for a proper purpose—to explain respondent's inconsistent pretrial and trial testimony. Furthermore, the prejudicial effect of the testimony, if any, was mitigated by the trial court's explicit instruction to the jury not to award any damages for emotional distress.

4. Van Horn's Letter to County Attorney

[49] Appellants argue that the trial court erred by not allowing them to enter rebuttal evidence to a letter that Van Horn had written to the Hennepin County attorney. Appellants argue that admission of this letter "opened the door" for them to introduce further evidence regarding the criminal proceedings in *McKown I.* Appellants cite *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn.1977), which involves the doctrine of curative admissibility. This doctrine permits otherwise inadmissible evidence to be admitted where an opponent has "'opened the door' by introducing similarly inadmissible evidence on the same point." *Id.* at 386. If the original evidence is "admissible or nonprejudicial," then the trial court has discretion on whether to admit related evidence on a "curative admission" basis. *Id.*

Here, the trial court did not abuse its discretion in excluding the evidence because the court—at appellants' request—had redacted portions of the letter before allowing it into evidence, which made the letter both admissible and non-prejudicial.

5. Handwritten Notes

[50] Appellants argue that the trial court improperly excluded respondent's handwritten notes from an unrelated prior custody proceeding, which allegedly show that Lundman knew (before Ian's illness) that Kathleen McKown would use

Christian Science care if Ian ever became ill. Appellants sought to admit the notes to attack respondent's credibility.

But the trial court properly excluded this evidence on the ground that its admission would violate respondent's attorney-client privilege and that it had been inadvertently disclosed to appellants.

6. Religious Documents and Testimony

[51] Appellants argue that the trial court improperly admitted witness testimony regarding religious documents and policies, and that the evidence incited the jury against the Christian Science religion and inflated the damage award.

But allowing respondent's inquiry into Christian Science documents and policies was not error because appellants themselves first introduced testimony and exhibits on the subject. *See Peterson v. Sorlien*, 299 N.W.2d 123, 130 (Minn.1980) (allowing defendant to introduce relevant evidence regarding plaintiff's religious association after plaintiff had voluntarily placed matter in issue), *cert. denied*, 450 U.S. 1031, 101 S.Ct. 1742, 68 L.Ed.2d 227 (1981). Appellants carried Bibles while testifying. They put into evidence the Holy Bible, the church manual, copies of *Science and Health*, and writings of Mary Baker Eddy. Appellants offered expert testimony on their beliefs and testified on the philosophical underpinnings of their reliance on prayer healing.

Furthermore, we agree with respondent that some basic understanding of Christian Science health care was necessary. *See id.* at 129-30 (permitting evidence regarding religious beliefs despite inherent danger of religious bias).

7. Ian's Choice

[52] Appellants argue that the trial court erroneously permitted irrelevant evidence and argument on whether they

gave Ian a choice regarding his health care. They argue that the testimony was inflammatory and irrelevant.

But testimony regarding Ian's choice was relevant to distinguish this case from others where an individual freely chose to undergo Christian Science treatment. *Cf. Baumgartner*, 490 N.E.2d at 1326 (concerning rights of competent adults to choose to refuse medical treatment). Further, the evidence was at least partially relevant as an indicator of the reasonableness of appellants' conduct; the record contains evidence that church policy prefers proof that a patient actually chose to forego medical treatment.

8. Liability Insurance

[53] Appellants argue that respondent improperly elicited testimony that Clifton House had purchased liability insurance for its employees. The testimony was admitted when a witness, questioned as to why he believed Clifton House could be defined as a "health care provider," testified that Clifton House had liability insurance for its employees.[10]

The testimony was not prejudicial because it was part of a narrative answer covering many things that placed no emphasis on the item. Furthermore, the information had already been admitted into evidence via the Clifton House Employee Manual, which states that Clifton House provides its employees with liability insurance. *See Wilson v. Home Gas Co.*, 267 Minn. 162, 168, 125 N.W.2d 725, 729 (1964) ("[T]he existence of insurance * * *, if it becomes relevant to prove or rebut an issue arising in the trial of the case, * * * may be admissible even though it is prejudicial."); *Sander v. Dieseth*, 230 Minn. 125, 127, 40 N.W.2d 844, 845 (1950)

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[10] We also note that appellants' argument fails based on our decision today that Clifton House did not have a duty to Ian.

(jury's knowledge of insurance not necessarily prejudicial because average citizen knows it already).

B. Closing Argument

[54] Appellants argue that the trial court permitted improper closing argument that "belittled" their religious convictions.

> Whether remarks made in final argument require a cautionary instruction for misconduct of counsel rests largely in the trial court's discretion, and the appellate court should not reverse its determination unless the conduct is so prejudicial that it would be a miscarriage of justice to permit the result to stand.

Robinson v. Mack Trucks, Inc., 426 N.W.2d 220, 227 (Minn.App.1988), *pet for rev. denied* (Minn. Sept. 28, 1988). To be reversible error, the remarks must clearly influence the verdict. *Thomson v. Boles*, 123 F.2d 487,495 (8th Cir.1941), cert denied, 315 U.S. 804, 62 S.Ct. 632, 86 L.Ed. 1204 (1942). Having reviewed the transcript, we conclude the trial court did not err in holding that respondent's closing argument was not so egregious as to require a new trial.

C. Jury instructions

[55] Trial courts are allowed considerable latitude in selecting the language in jury instructions. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn.1986). An appellate court will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Id.*

Appellants first argue that the trial court erred as a matter of law in instructing the jury that Minn.Stat. §§ 609.378 and 626.556 were not to be considered in determining negligence. Appellants generally argue that "informed compliance" with the statutes may constitute due care. We disagree. The

instruction was a correct statement of the law.[11] Furthermore, the instruction was not prejudicial because the court so instructed the jury only after appellants' counsel had violated previous rulings that the statutes did not establish the applicable standard of care (and should go unmentioned).

Appellants also argue that the trial court erred in withdrawing an affidavit from evidence and instructing the jury to disregard it. The affidavit was written by Ian's 17-year-old sister, Whitney Lundman. In it she disclaims her right to recovery from the wrongful death action.

[56] The withdrawal of evidence is discretionary with the trial court and is allowed where the evidence is irrelevant and immaterial. *Mettling v. Mulligan*, 303 Minn. 8, 16, 225 N.W.2d 825, 830 (1975) (quoting *Maas v. Midway Chevrolet Co.*, 219 Minn. 461, 464, 18 N.W.2d 233, 235 (1945)). Here, the trial court properly withdrew the affidavit from evidence and properly gave an instruction concerning it because it was inadmissible from the start.

V.

REMITTITUR

We turn now to respondent's claimed error.[12] Respondent argues that the trial court erred in granting remittitur on the

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[11] The trial court instructed the jury:

There has been reference through this case to several criminal statutes, including the child neglect and reporting statutes. These statutes do not establish the standard for negligence in this case. These statutes shall not be considered by you in determining whether any one party is negligent in this case.

[12] In an earlier order we deferred decision on respondent's motion to strike. Respondent first argues that appellant First Church of Christ, Scientist, improperly placed a section entitled, "A Brief View of Christian Science" in its statement of the case. We agree and strike that portion of the First Church Brief. *See* Minn.Civ. App.R. 128.03 ("Whenever a

compensatory damages because adequate evidence supported the jury's verdict.

[57, 58] The decision whether to grant a remittitur is within the trial court's sound discretion. *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892, 898 (Minn.1978). When the trial court grants remittitur and gives its reasons, an appellate court is unlikely to tamper with that determination. *Sorenson v. Kruse*, 293 N.W.2d 56, 63 (Minn.1980). The trial court here granted remittitur on the ground that the $5.2 million award was excessive under the facts presented at trial. The trial court did not abuse its sound discretion.

Appellants, on the other hand, argue that the award of $1.5 million in compensatory damages is improper because Minnesota courts have previously not awarded more than $1 million for the death of a child. But, on this question, past cases represent history, not controlling law. At one time, the highest recovery was a few thousand dollars.

Appellants also argue there was only "weak" evidence regarding respondent's loss of companionship, and that the trial court failed to address facts regarding his late child support payments. But there is evidence supporting the trial court's findings that Lundman was a "very loving father" and that he had followed Ian's growth in "great detail." The evidence also supports the finding that Whitney Lundman had a close, loving relationship with Ian. Hence, the award of $1.5 million was not an abuse of discretion.

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reference is made in the briefs to a part of the record[,] * * * the reference shall be made to the particular part of the record, suitably designated, and to the specific pages of it."). Respondent also argues that appellants improperly included four items in their joint appendix. We deny this motion because each of the four items is contained in the trial court record. *See* Minn.R.Civ.App.P. 110.01 (record on appeal consists of papers filed in trial court, exhibits, and transcript of proceedings).

DECISION

The trial court erred in denying the First Church of Christ Scientist's motion for J.N.O.V. or remittitur of the punitive damage award; that award was unconstitutional. The trial court erred in denying motions for J.N.O.V. made by appellants James Van Horn, Clifton House, and the First Church of Christ, Scientist; they had no duty to Ian. The court properly granted appellants' motions for remittitur of the compensatory damage award from $5.2 million to $1.5 million. Appellants' alternative motions for a new trial were properly denied. Judgment in the amount of $1.5 million against Kathleen McKown, William McKown, Quinna Lamb, and Mario Tosto is affirmed.

Affirmed in part and reversed in part.

KLAPHAKE, Judge (concurring in part, dissenting in part).

I concur with the majority's reversal of the punitive damages award, and the compensatory award against Clifton House, and the affirmance of the compensatory award against Kathleen McKown, William McKown, Quinna Lamb, and Mario Tosto. I write separately, however, because (1) James Van Horn assumed a duty of care towards Ian, and (2) the jury finding of an agency relationship between the First Church in Boston and appellants is not perverse and palpably contrary to the evidence. Accordingly, I would also hold James Van Horn and the First Church liable for compensatory damages.

1. *Van Horn*

The existence of a duty is a question of law. *Carlson v. Mutual Service Ins.*, 494 N.W.2d 885, 887 (Minn.1993).

Generally, there is no duty to aid another, unless the defendant stands in a "special relationship" with a foreseeable plaintiff. *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn.1993); *Wood v. Astleford*, 412 N.W.2d 753, 755 (Minn.App.1987), *pet. for rev. denied* (Minn. Nov. 24, 1987). A special relationship exists where: (1) one party has custody of another under circumstances that deprive the other person of normal opportunities of self-protection, *Harper*, 499 N.W.2d at 474 (citing Restatement (Second) of Torts § 314A (1965)); or (2) one party gratuitously accepts the responsibility of acting to protect another, even though there was no initial duty to protect another. *Walsh v. Pagra Air Taxi, Inc.* 282 N.W.2d 567, 570-71 (Minn.1979).

Appellant James Van Horn was the one-person Committee on Publications (CoP) who implemented First Church policy on healing for the State of Minnesota. The First Church Board of Directors in Boston supervised him in his duties, which included advising Christian Scientists on their healing actions. First Church written policies required him to directly interact with parents, nurses, practitioners, and other caregivers of seriously, ill children.

The trial court found that Van Horn assumed a duty of care toward Ian based in part on his "considerable power over Ian's welfare." The majority reverses on the ground that no special relationship arises solely from the fact that Van Horn knew that a child was ill. But the majority's account of Van Horn's role in providing care fails to acknowledge his direct control over both Ian's care and the people administering that care.

Van Horn had conversations with William McKown, Kathleen McKown, and Quinna Lamb, the journal-listed nurse, regarding Ian's condition, and he himself called the First Church officials in Boston regarding Ian's condition. Each of these conversations amounted to much more than a simple relaying of facts that Ian was ill.

Van Horn spoke with Kathleen McKown when she first believed that her son's life was in danger. Because First Church policy requires that the CoP be contacted when a child is seriously ill and not improving, Van Horn knew from day one that Ian's condition was poor and potentially life threatening. In that initial call, Van Horn verified that Kathleen McKown had retained a journal-listed Christian Science Practitioner pursuant to First Church policy. Second, Van Horn called his boss, the National CoP, and discussed the fact that Ian was seriously ill and not improving. Van Horn was contacted a third time that same day when William McKown called to tell him that Ian was possibly suffering from an "aggressive" contagious disease. Pursuant to First Church policy regarding a child's failing health, in that conversation, Van Horn provided William McKown with telephone numbers of local health officials. Finally, when Quinna Lamb arrived to provide Christian Science nursing care, she immediately called Van Horn to report her presence.

These facts support the trial court's legal conclusion that Van Horn assumed a duty to Ian based on a special relationship. Van Horn "gratuitously accepted" the responsibility to protect Ian through his constant contact with Ian's caregivers as they tended to his failing health, and he received continuous updates on Ian's failing condition. Although others directly provided Ian's care, they relied on Van Horn's continuous advice about the options according to First Church policy. There is evidence in the record that the CoP is instructed to tell parents who contact him regarding their seriously-ill children that "[w]hile care must be taken to cooperate with officials, only information necessary to allay any suspicion or fear that the child is not being adequately cared for should be given." By acting consistently with this instruction, Van Horn insulated Ian from public intervention which may have saved his life. This evidence provides a sufficient basis from which the trier-of-fact could have

reasonably inferred that Van Horn assumed a duty of care toward Ian. This is not a case of duty arising from simple knowledge of an illness.

2. *The First Church*

The majority also declines to find that the First Church assumed a duty toward Ian on the ground that the jury finding of agency is contrary to the evidence. Again, I disagree.

Whether an agency relationship exists is generally a question for the jury unless the evidence is conclusive. *PMH Properties v. Nichols*, 263 N.W.2d 799 (Minn.1978). Here, the jury found by special verdict that Van Horn, Tosto, and Lamb were agents for the First Church. On review of a special verdict, the answers to the questions will not be set aside:

> [U]nless they are perverse and palpably contrary to the evidence or where the evidence is so clear to leave no room for differences among reasonable people. The evidence must be viewed in a light most favorable to the jury verdict. If the jury's special verdict finding can be reconciled on any theory, the verdict will not be disturbed.

Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302, 309 (Minn.App.1992) (citations omitted), *pet. for rev. denied* (Minn. Feb. 12, 1993).

Viewing the evidence in a light most favorable to the jury verdict that an agency relationship existed, the jury's finding of agency is not perverse or contrary to the evidence. There was evidence in the record of an agency relationship founded on the First Church's listing of Tosto and Lamb in the Christian Science Journal. The First Church certified through this list that Lamb and Tosto met the First Church's "stringent" requirements to qualify as a nurse or practitioner. Further, the evidence suggests that a Journal listing demonstrated the "love, strength and support of the Mother Church" for each

individual. Hence, the jury could reasonably find an agency relationship.

The majority holds that there was no agency relationship because the First Church had no control over Lamb or Tosto's actions. *See Jurek v. Thompson*, 308 Minn. 191, 198-99, 241 N.W.2d 788, 791 (rejecting the jury's finding of agency where "defendant's right of control * * * is totally lacking") (citing Restatement, Agency 2d, § 1, comment b). But it is clear that the First Church installed Lamb and Tosto as a Christian Science nurse and practitioner, and had the power to remove them from the Journal list for failure to follow church tenets. The First Church's removal of names from the Journal list would have ended Lamb and Tosto's careers as Christian Science nurse and practitioner. Under these facts, the jury could reasonably find that the First Church had control over them.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Douglass G. Lundman, as trustee
for the next of kin of Ian
Douglass Lundman, deceased,

Plaintiff,

vs.

ORDER AND MEMORANDUM
File No. 91-8197

Kathleen McKown, William McKown,
Mariano Victor Tosto, Quinna
Lamb, Clifton House, Inc. a
Minnesota corporation,
The First Church of Christ,
Scientist, and James Van Horn,

Defendants.

The above-entitled matter came on for hearing before the Honorable Sean J. Rice, Judge of District Court, on the 2nd day of November, 1993 on the defendants' motions for a new trial, defendants' motion for JNOV and defendants' for remittitur. In addition, the above-entitled matter came on for hearing before the Honorable Sean J. Rice, Judge of District Court, on the 21st day of December, 1993 on plaintiff's motion for costs and disbursements.

James H. Kaster, Esq., Robert J. Bruno, Esq., and Paul Lukas, Esq., appeared on behalf of plaintiff Douglass G. Lundman.

Terrence J. Fleming, Esq. appeared on behalf of defendant Kathleen McKown.

Ronald Riach, Esq., appeared on behalf of defendant William McKown.

Larry B. Leventhal, Esq. appeared on behalf of defendant Mariano Victor Tosto.

Wendy Wildung, Esq. appeared on behalf of defendant James Van Horn.

William G. Christopher, Esq. appeared an behalf of defendant The First Church of Christ, Scientist.

Donna J. Blazevic, Esq. appeared on behalf of defendant Clifton House, Inc.

Based upon the memoranda of law, exhibits, arguments of counsel at hearing and all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. That defendants' motions for a judgment notwithstanding the verdict are denied.

2. That defendants' motions for a new trial are denied.

3. That defendants' motions for remittitur of the compensatory damage award of $5.2 million is granted and the jury's compensatory damage award is reduced to $1,500,000.

4. That the First Church of Christ Scientist's motion for remittitur of the punitive damage award is denied.

5. Pursuant to a stipulation by the parties, the entry of judgment in this case is stayed until ten days after the date of this Order.

6. Let the attached memorandum be made a part of this order.

BY THE COURT:

s/_____
Sean J. Rice
Judge of District Court

Dated this 17th day of March, 1994.

MEMORANDUM

All of the defendants have challenged the jury's compensatory damage verdict by filing alternative motions for judgment notwithstanding the verdict pursuant to Minn. R. Civ. P. 50.02 and for a new trial pursuant to Minn. R. Civ. P. 59.01. The First Church of Christ, Scientist, ("the Church"), has challenged the punitive damage verdict by filing for a judgment notwithstanding the verdict and a new trial.

In addition, all defendants have filed motions for remittitur of the jury's $5.2 million dollar compensatory damage award, and the First Church of Christ Scientist has filed a motion for remittitur of the jury's $9 million punitive damage award.

I. Defendants' motions for a judgment notwithstanding the verdict.

A. Standard for a judgment notwithstanding the verdict.

Pursuant to Minn. R. Civ. P. 50.02(a), a judgment notwithstanding the verdict may be entered "if the moving party would have been entitled to a directed verdict at the close of the evidence." The party moving for a JNOV must "accept the view of the entire evidence most favorable to the prevailing party and. . . [the JNOV] . . . is to be granted only if reasonable minds could reach but one conclusion against the verdict." Kleven v. Geigy Agricultural Chemicals, 303 Minn. 320, 322, 227 N.W.2d 566, 568 (1975).

B. Defendants argue that the jury's verdict violated their Constitutional rights to freedom of religion.

1. U.S. and Minnesota Constitutions

The defendants argue that the plaintiff's civil action places a burden on their religious beliefs in violation of the U.S. and Minnesota Constitutions.

Under the first amendment to the U.S. Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The protections of the first amendment have been applied to the states through the fourteenth amendment. Cantwell v. State of Connecticut, 310 U.S. 296 (1940).

In addition, Article I, Section 16 of the Minnesota Constitution states:

> The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship or maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

However, these protections from governmental regulation are not absolute. While the freedom to believe is absolute, "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." Braundfield v. Brown, 366 U.S. 599 (1961).

Under the Minnesota Constitution, a balancing test must be applied once it has been determined that a state regulation burdens the free exercise of religion. State by McClure v. Sports & Health Club, 370 N.W.2d 844, 851 (Minn. 1985). This test balances the competing interests of religious freedom with the government's interest in public safety. The government regulation which burdens the free exercise of religion will be constitutional only if the state has shown (1) that it has a "compelling and overriding" state interest for the regulation, State by Cooper v. French, 460 N.W.2d 2, 9 (Minn. 1990), and (2) if the state has shown that the regulation is the least restrictive way for the state to achieve its goal. State by McClure v. Sports & Health Club, 370 N.W.2d 844, 851 (Minn. 1985).

Unlike the case law interpreting the Minnesota Constitution, the case law interpreting the U.S. Constitution does not require the balancing test if the regulatory law was not created to regulate religious conduct or belief. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). As the court stated in its December 3, 1991 Memorandum, the defendants' arguments will be analyzed under the balancing test required by the case law interpreting the Minnesota Constitution.

Under this balancing test, the defendants' right to the free exercise of religion guaranteed in the Minnesota Constitution was not violated by the jury's verdict.

First, the court finds that there is a compelling state interest in this case. This interest is the state's interest to protect the health, safety and welfare of its citizens, especially children. As the Supreme Court held in Prince v. Massachusetts, 321 U.S. 158, 166, 167 (1944), a state can enact regulations to protect the health safety, and welfare of children even though the regulation may burden the religious interests of some people.

Allowing the defendants to be subject to tort liability is the least restrictive means for the state to achieve its compelling interest. In Black v. Snyder, 471 N.W.2d 715 (Minn.App. 1991), the court held that tort liability was the least restrictive way for the state to achieve its compelling interest of preventing sexual harassment by Church officials. Id. at 721. Similarly, tort liability is also the least restrictive way for the state to achieve its compelling state interest in the case at bar.

Because the state has a compelling state interest and because tort liability is the least restrictive means for the state to achieve its interest, the plaintiff's claims against the defendants do not violate the defendants' rights to the free exercise of religion. See, Court's December 3, 1991 Memorandum.

2. Defendants' arguments of clergy malpractice and constitutional ecclesiastical jurisdiction.

The Church argues that its documents were used to create a standard of care and that this violates its constitutional ecclesiastical jurisdiction. In addition, defendant, Mario Tosto, argues that his religious freedom has been violated because plaintiff's claim has created an action for clergy malpractice.

In Protestant Reformed Church of Edgerton v. Tempelman, 249 Minn. 182, 192, 81 N.W.2d 839, 847 (1957), the Minnesota Supreme Court held:

> The church alone has jurisdiction of communion, faith, or discipline and the members must submit to such rules and regulations governing these matters as may be prescribed by the church government, but the church does not always have exclusive jurisdiction over property or personal

liberty or over any right which it is the duty of the civil power to protect. Id.

The court finds that there has been no violation of the Church's ecclesiastical jurisdiction, and the court also finds that the plaintiff's claim did not create an action for clergy malpractice. Both of defendants' arguments are based upon the premise that the Christian Science religion was placed on trial. However, the plaintiff's claims were based upon the defendant's unreasonable conduct in caring for Ian Lundman's health. The plaintiff's claims were not based upon any religious doctrine, and thus there has been no violation of the Church's ecclesiastical jurisdiction. Likewise, there was not a claim of clergy malpractice because only the reasonableness of defendants' conduct was at issue. As shown in Protestant Reformed Church of Edgerton v. Tempelman, 249 Minn. 182, 81 N.W.2d 839, the plaintiff's claim is permissible.

C. Defendants argue they are entitled to a judgment notwithstanding the verdict because an entry of a judgment against them would violate their guarantees of religious liberty.

Defendants argue that because the jury was allowed to judge the reasonableness of their beliefs, the plaintiff placed the Christian Science religion and the defendants own religious beliefs on trial in violation of the U.S. Constitution and in violation of the Minnesota Constitution. See, United States v. Ballard, 322 U.S. 78 (1944); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 714 (1981).

However, the plaintiff's claims against the defendants did not require the jury to judge the reasonableness of the defendants" religious beliefs. The jury only judged the reasonableness of the defendant's conduct. As a result, the

defendants' constitutional right to religious liberty was not violated. See, United States v. Ballard, 322 U.S. 78 (1944).

D. Defendants argue that the jury's verdict violates their constitutional right to due process.

The defendants argue that the entry of judgment of the jury's special verdict against the defendants will violate their rights to due process.

1. Defendants argue that they lacked fair notice that their conduct would lead to the imposition of civil liability.

Based upon the analysis of due process violations on the part of the defendants in State v. McKown, 475 N.W.2d 63 (Minn. 1991), the defendants argue that their constitutional rights to due process were violated in the instant case. In State v. McKown, 475 N.W.2d 63, the court found that the defendants conduct was immune from criminal liability based upon Minn. Stat. §§ 609.378 and 626.556, and that it would be a violation of the defendants' due process rights to hold them criminally liable for their conduct. However, State v. McKown, is not applicable to this case because it addressed statutory exemptions from criminal liability, not civil liability, and "ordinarily statutes are presumed not to alter or modify the common law unless they expressly so provide." Agassiz & Odessa Mutual Fire Ins. Co. v. Magnusson, 272 Minn. 156, 166, 136 N.W.2d 861, 868 (Minn. 1965).

In Valtakis v. Putnam, 504 N.W.2d 264 (Minn.App. 1993), the court held that Minn. Stat. § 626.556 does not create a civil cause of action. The court in Valtakis stated:

> Appellant argues that the statute imposed a duty on respondents to report and that failure to report was a

> breach from which appellant can seek tort damages. . .As a result, appellant argues that the criminal misdemeanor sanction is merely an additional penalty, along with a civil suit, which a person who fails to make a report may face.
>
> We disagree. A statute does not give rise to a civil cause of action unless the language is explicit or it can be determined by clear implication. . .There is no mention of a civil cause of action for failure to report nor is a civil action implied by the language of the subdivision.
>
> Nonetheless, appellant argues that CARA taken as a whole implies a duty between respondents and himself, giving rise to a common-law negligence action. However, where no common-law duty existed before the statute was enacted, we must limit ourselves to the explicit language and clear implication of the statute. . .The principles of judicial restraint forbid us from creating new causes of action which the legislature has not expressed or implied. Since CARA created the duty to report, a civil action cannot lie outside the express or clearly implied language of the statute . . . Valtakis, 504 N.W.2d at 266.

The court's conclusion in Valtakis was that Minn. Stat. § 626.556 does not create a civil cause of action. The plaintiff argues that inherent in this decision is that Minn. Stat. § 626.556 does not abrogate the common law standard of care, and that compliance or noncompliance with Minn. Stat. § 626.556 is not relevant in a common law negligence action. Defendants argue that based upon State v. McKown, 475 N.W.2d 63, Minn. Stat. § 626.556 is relevant in a civil action in determining the standard of care.

This court holds that based upon Valtakis, and because statutes normally do not alter or modify the common law without expressly so stating, Agassiz & Odessa Mutual Fire Ins. Co. v. Magnusson, 272 Minn. 156, 166, 136 N.W.2d 861,

868 (Minn. 1965), Minn. Stat. § 626.556 does not abrogate the common law standard of care, and that Minn. Stat. § 626.556 is irrelevant to this action.

In addition, Minn. Stat. § 609.378 is not relevant in a civil action for determining the standard of care. Because Minn. Stat. § 609.378 has been narrowly applied, this court finds that allowing Minn. Stat. 609.378 to be considered in determining the standard of care in a civil action is unwarranted. If the court were to follow defendants' arguments and allow the child neglect statute to be relevant in a civil action for determining the standard of care, the court would be extending the application of Minn. Stat. § 609.378 far beyond the clear language of the statute. Minn. Stat. §609.378, subd. 1(a) states:

> If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of this clause.

Under the common law, a parent has a duty to protect his child. Miller v. Lonsen, 228 Minn. 400, 37 N.W.2d 543, 545 (1949). Minn. Stat. § 609.378 was enacted to create criminal penalties against a parent for failing to meet part of his common law duty of protecting his child. The statute clearly states that the spiritual healing exemption is applicable only "for the purposes of this clause." Thus, this statute was not created to modify the common law standard of care, and applying this exemption to a civil action in abrogation of the common reasonable person standard of care would contravene the clear intent of this statute.

In State v. McKown, 475 N.W.2d 63, the court emphasized that the spiritual treatment exception in Minn. Stat. § 609.378 should be narrowly construed. The court

refused to hold that the spiritual treatment exception in Minn. Stat. § 609.378 was applicable to all criminal cases involving people who rely on spiritual treatment.

If the court allows Minn. Stat. 609.378 to be considered in a civil action in determining the standard of care, it would result in an even further extension of the application of this statute than was allowed in State v. McKown, 475 N.W.2d 63. In that case, the court refused to extend application of the staute to all criminal actions. The court is unwilling to apply the child neglect exception in Minn. Stat. § 609.378 to a civil action without a clear mandate by the legislature.

Defendants also argue that under Minnesota case law, a person's compliance with a criminal statute is sufficient to show that this person acted with due care. However, the cases defendants cite to support their argument are inapplicable to the case at bar.

For example, defendants cite Leisy v. Northern Pac. Ry. Co., 230 Minn. 61, 40 N.W.2d 626 (1950) to support their argument that compliance with a criminal statute is sufficient for a showing that a person acted with due care. In Leisy, an action was brought by a passenger of a car that was hit by a train at a railroad tracks crossing. The court analyzed a Minnesota criminal statute which set forth the procedures that a railroad engineer had to follow when he approached a crossing. If the engineer failed to satisfy these procedures, he was guilty of a misdemeanor. Id. The court held that an engineer who complied with this statute acted with due care as a matter of law. Id. The statute at issue in Leisy was clearly created to set the standard of care by which to judge the train engineer.

However, unlike Leisy, Minn. Stat. §§609.378 and 626.556 were not clearly created to establish the standard of care necessary to adequately deal with a sick child. Rather, these statutes were only addressing what types of conduct constitute child neglect. As a result, it is not a violation of the

defendants' due process rights to allow them to be subject to civil liability for their conduct.

E. Defendant Van Horn's duty of care, breach and causation.

Van Horn was subject to a duty to act to help Ian under two theories. First, his duty to act was based upon his special relationship with Ian Lundman. Harper v. Herman, 499 N.W.2d 472 (Minn. 1993); Regan v. Stromberg, 285 N.W.2d 97 (Minn. 1979); Depue v. Flatau, 100 Minn. 299, 111 N.W. 1 (1907); Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979).

Second, Van Horn was subject to a duty to act because a party who decides to act, even gratuitously, is subject to the duty to act reasonably. Thelen v. Spilman, 251 Minn. 89, 97, 86 N.W.2d 700, 706 (1957). If the party who decides to act fails to do so in a reasonable manner, he is responsible for "all reasonably foreseeable consequences." Id.

A special relationship exists when one party has custody of another party, "under circumstances in which that other person is deprived of normal opportunities of self protection." Harper, 499 N.W.2d at 474. In this situation, the party with custody will have an affirmative duty to act to protect the other party. In Harper, the plaintiff, a 20 year man, was one of several guests on the defendant's boat. The defendant was a 64 year man and was an experienced boat owner. Harper, 499 N.W.2d at 473. The defendant took the plaintiff and the others on the boat for a boat ride, and then decided to anchor the boat. After the defendant anchored the boat, the plaintiff asked the defendant if he was "going in." The defendant answered, "yes," and the plaintiff, without warning, dove into the water which was only two - three feet deep. Id. Under these facts the Harper court found that the defendant did not have a duty to warn the plaintiff of the danger of diving into

shallow water because a special relationship did not exist between the plaintiff and defendant. Specifically, the court held:

> the record before this court does not establish that Harper was either particularly vulnerable or that he lacked the ability to protect himself. Further, the record does not establish that Herman held considerable power over Harper's welfare, or that Herman was receiving a financial gain by hosting Harper on his boat. Finally, there is nothing in the record which would suggest that Harper expected any protection from Herman: indeed, no such allegation has been made. Harper, 499 N.W.2d at 474, 475.

However, in the case at bar, there was sufficient evidence submitted at trial to show that a special relationship existed between Van Horn and Ian Lundman. First, unlike the plaintiff in Harper, Ian was particularly vulnerable, and was unable to protect himself. See, supra, pp. 26-29.

Second, unlike the situation in Harper, Van Horn did have considerable power over Ian's welfare. The Church set up a policy whereby the Committee on Publication was to be contacted every time a child with Christian Scientist parents became seriously ill and was not responding to the Christian Science care within a reasonable amount of time. In reliance on this policy, the McKowns contacted Van Horn, and sought advice from Van Horn on how to help Ian. Thus, Van Horn had considerable power over Ian's health care.

There was evidence submitted at trial which showed that in less than one day Van Horn was contacted by the McKowns twice to discuss Ian's condition, and that he was also contacted by Quinna Lamb once. Kathleen McKown testified that she relied upon Van Horn and that she relied upon the Legal Rights and Obligations Manual distributed from Van

Horn's office when she made her health care decision concerning Ian.

In addition, Van Horn made sure that Kathleen McKown had hired a journal listed practitioner, and Van Horn also contacted the Church in Boston after communicating with Kathleen McKown on the telephone. During that conversation he informed his superior of a sick child in Minneapolis.

There was also evidence submitted at trial to show that Van Horn had reason to know that Ian was seriously ill. In light of the fact that Van Horn was contacted three times in one day concerning Ian's health, that he reported Ian's condition to his superiors in Boston, and that he was to be contacted only when a child was seriously ill, there was sufficient evidence submitted at trial for the jury to determine that Van Horn had reason to know that Ian was seriously ill.

This evidence demonstrates that unlike Harper, there was sufficient evidence submitted at trial to show that a special relationship existed between Van Horn and Ian Lundman, and that Van Horn had the duty to provide Ian with reasonable care.

In addition, this evidence shows that Van Horn did take actions on Ian's behalf. As a result, under Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700, once he took these actions, he was under a duty to act reasonably.

There was sufficient evidence at trial to support the jury's finding that Van Horn breached this duty to act reasonably. Van Horn failed to direct Kathleen McKown or anyone else, to take Ian to a hospital to receive medical treatment which would have saved his life. As a result, there is sufficient evidence to support the jury's finding that Van Horn breached his duty to act reasonably.

This breach was a proximate cause of Ian's death. As shown, Van Horn is to be contacted only when a child is seriously ill and is not responding to Christian Science care

within a reasonable amount of time. The evidence showed that Van Horn was contacted three times in one day about Ian's health and that he failed to find medical treatment for Ian. If Van Horn had found medical treatment for Ian Lundman, it would have saved his life. There was sufficient evidence submitted at trial for the jury to conclude that Van Horn's conduct was a proximate cause of Ian's death.

F. Defendant Clifton House and Quinna Lambs duty of care, breach and causation.

The court finds that both Clifton House and Quinna Lamb, like Van Horn, had duties to act. Similar to Van Horn, both Clifton House and Quinna Lamb had a special relationship with Ian Lundman, Harper v. Herman, 499 N.W.2d 472 (Minn. 1993), and they also had the duty to act reasonably under Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700. Thus, they were both subject to the duty to provide Ian with reasonable care.

First, as shown above, Ian Lundman was particularly vulnerable and was not able to take care of himself.

In addition, both the Clifton House and Quinna Lamb had considerable control over Ian Lundman's welfare. For example, the McKowns looked to both the Clifton House and Quinna Lamb for advice in dealing with Ian's health care. There was evidence submitted at trial that employees of the Clifton House recommended to Kathleen McKown that she give Ian a certain type of liquid diet.

In addition, there was evidence submitted at trial which showed that the Clifton House sent Quinna Lamb, a Christian Science nurse, to see Ian Lundman to help care for his health. Quinna Lamb was the only nurse at the McKowns house, and thus had considerable control over Ian's welfare. These facts show that a special relationship existed between Ian Lundman

and the Clifton House, and between Ian Lundman and Quinna Lamb.

In addition, once the Clifton House and Quinna Lamb acted to help improve Ian's health, they were under a duty to act reasonably under Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700.

There was sufficient evidence submitted at trial for the jury to conclude that both the Clifton House and Quinna Lamb breached their duties. Both the Clifton House and Quinna Lamb were aware of the seriousness of Ian's illness and failed to advise the McKowns to provide Ian with medical treatment. In addition, the Clifton House violated one of its own regulations which prohibits the treatment of minors, and prohibits giving treatment to people who have not consented to Christian Science treatment. Thus, there was sufficient evidence submitted at trial to show that the Clifton House and Quinna Lamb breached their duties.

There was sufficient evidence at trial for the jury to conclude that the conduct of the Clifton House and the conduct of Quinna Lamb were both a proximate cause of Ian's death. Clearly, both the Clifton House and Quinna Lamb had knowledge of the seriousness of Ian's illness. The Clifton House was contacted by the McKowns on two occasions when Ian was not able to keep any food in his stomach. Also, Quinna Lamb saw Ian herself and she knew that he was seriously ill. If Ian had been given medical treatment at either of these times, his life would have been saved.

In addition, Kathleen McKown testified that before the Clifton House sent Quinna Lamb over to see Ian, she was ready to take Ian to North Memorial Hospital. However, once Quinna Lamb arrived, Kathleen McKown did not take Ian to the hospital, and Quinna Lamb did not provide Ian with medical care. If Ian had been provided with medical care when Quinna Lamb arrived, Ian's life would have been saved.

This evidence is sufficient to support the jury's conclusion that the conduct by Clifton House and Quinna Lamb breached their duties to provide Ian with reasonable care, and that this breach was a proximate cause of Ian's death.

H. Tosto's duty of care, breach and causation.

Mario Tosto owed Ian Lundman a duty to act reasonably. First, a special relationship existed between Tosto and Ian Lundman. Second, Tosto was under the duty to act reasonably under Thelen v. Spilman, 251 Minn. 89, 97, 86 N.W.2d 700.

Tosto was hired as a journal listed practitioner to pray for Ian in order to help improve Ian's health. There was evidence submitted at trial which showed that Tosto was aware of the seriousness of Ian's illness. As Ian Lundman's journal listed practitioner, Tosto had considerable power over Ian's welfare when Ian was in a particularly vulnerable condition. As a result, a special relationship existed between Tosto and Ian Lundman.

In addition, Tosto was under a duty to provide Ian with reasonable care under Thelen. Tosto took action in Ian's care because he was fully aware of his condition, prayed for him, and yet did not take any reasonable steps to seek medical attention for him. Once he became involved, he was under the duty to act reasonably.

There was sufficient evidence submitted at trial to show that Tosto breached his duty to act reasonably. Because Tosto did not give Ian sufficient medical treatment even though he knew that Ian was seriously ill, there was sufficient evidence submitted at trial to show that Tosto breached his duty to act reasonably.

There was also sufficient evidence submitted at trial to support the jury's finding that Tosto's breach of his duty was the proximate cause of Ian's death. As was the case with Van

Horn, the Clifton House and Quinna Lamb, Tosto was contacted because of his expertise in helping to improve the health of sick children. Tosto was aware of the seriousness of Ian's health. By failing to act when his action would still have helped improve Ian's health, Tosto's actions or inactions, proximately caused Ian's death.

I. The duty to act, breach and causation of the Church.

Through its agents, the Church helped to care for Ian's health. These agents were Van Horn, who was a member of the Committee on Publication, Tosto, who was the journal-listed practitioner, and Lamb, the Christian Science nurse. As shown above, all had a duty to act which was breached and which was a proximate cause of Ian's death. Because they were all agents of the Church, and their acts were authorized by the Church, the Church is liable for any damages resulting from their conduct. See, Norby v. Bankers Life Co., 304 Minn. 464, 231 N.W.2d 665 (1975).

J. The duty to act, breach and causation of William McKown.

William McKown was under a duty to protect Ian against unreasonable risks of harm because a special relationship existed between William McKown and Ian. In addition, William McKown was under a duty to act reasonably under Thelen v. Spilmar, 251 Minn. 89, 86 N.W.2d 700.

First, there was a special relationship between William McKown and Ian. William McKown knew of Ian's vulnerable condition because he was living with Ian and communicating with Kathleen McKown concerning Ian's condition. In addition, William had considerable control over Ian's welfare because William McKown was Ian's step father. As a result,

there was a special relationship between Ian and William McKown.

In addition, William McKown was under a duty to act reasonably under Thelen. William McKown attempted to help care for Ian's health. William McKown contacted the Clifton House to find care for Ian. Once William McKown began to care for Ian's health, he was under a duty to do so reasonably.

There was sufficient evidence for the jury to find that William McKown breached his duty to act reasonably because he knew that Ian was seriously ill, but he failed to provide him with medical treatment.

In addition William McKown's breach was a proximate cause of Ian's death. As shown, William McKown knew that Ian was deathly ill. There was evidence that William McKown was aware that Ian was vomiting and that Ian had become very weak. However, William did nothing to help Ian find medical treatment. As a result, William McKown's actions or inactions, proximately caused Ian's death.

K. The duty to act, breach and causation of Kathleen McKown.

Kathleen McKown and Ian had a special relationship because Kathleen Was Ian's mother, and had the duty to protect Ian from unreasonable harm. Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979). See, Court's December 3, 1991 Memorandum.

There was sufficient evidence submitted at trial to show that Kathleen breached this duty. Kathleen McKown knew how seriously ill Ian was, however she failed to seek medical treatment for Ian. This was a breach of Kathleen McKown's duty to protect Ian from unreasonable harm.

In addition, this breach was a proximate cause of Ian's death. Kathleen knew how seriously ill Ian was, yet she did not seek medical attention for him. Kathleen McKown's

breach of her duty to protect Ian from unreasonable harm was a proximate cause of Ian's death.

II. Remittitur

A. Standard for Remittitur

Whether a verdict" should be reduced or increased is "within the sound judicial discretion of the trial court." Brannan v. Shertzer, 242 Minn. 277, 288, 64 N.W.2d 755 (1954). In order to determine whether an award is excessive, and whether the award must be reduced because it is unsupported, "the trial judge must consider all the evidence, the demeanor of the parties, and the circumstances of the trial." Jangula v. Klocek, 284 Minn. 477, 488-489, 170 N.W.2d 587, 594 (1969).

Remittitur may be awarded whether or not the court finds that it was based upon passion or prejudice. Gross v. Hoag, 251 Minn. 217, 87 N.W.2d 542 (1958). If the court decides to reduce the amount of the verdict, the court should reduce it to the "highest dollar verdict possible under the evidence." In Re Petition of Sandt v. Hylen, 301 Minn. 475, 224 N.W.2d 342 (1974).

In Runia v. Marguth, 437 N.W.2d 45, 50 (Minn. 1989), the Minnesota Supreme Court held that a remittitur of a verdict can be made conditionally. A conditional remittitur means that the nonmoving party has the option to choose between the remittitur or a new trial. Id. While a conditional remittitur is ordinarily preferred, the trial court has the discretion to impose an unconditional remitittur of a compensatory damage verdict. Bowman v. Pamida, 261 N.W.2d 594, (Minn. 1977); Krueger v. Knutson, 261 Minn. 144, 111 N.W.2d 526 (1961). In addition, the court has the discretion to reduce punitive damages unconditionally.

Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988).

B. The Church argues that the jury's $9 million punitive damage award should be remitted to zero because the award of any punitive damage award against the church violates Minnesota public policy.

The Church argues that the jury awarded punitive damages against the church based upon the contents of its religious beliefs, and that it is a violation of Minnesota public policy to allow any punitive damage claim to be entered against it on this basis.

In Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 811 (Minn. App. 1992), the court held that punitive damages could be entered against a church without violating public policy. In Mrozka, the plaintiffs, a child abuse victim and his parents, brought a civil action against the church based upon injuries the child sustained from a priest who sexually abused the child. Id.

The Church argues that Mrozka is distinguishable from the facts in the present case. Although in Mrozka the award of punitive damages against a church was upheld as not violating public policy, it is the Church's position that any award of punitive damages in this case against the First Church of Christ Scientist would in fact violate Minnesota public policy. Defendants argue that in Mrozka the punitive damage award was not based upon any of the beliefs of the Catholic religion, but was based upon the priest's sexually abusive conduct. In contrast, the Church maintains that the jury awarded the punitive damages against the First Church of Christ Scientist based upon its religious beliefs of using spiritual treatment rather than medical treatment.

However, as discussed earlier, the plaintiff's claim was not based upon the Church's religious beliefs, but was based upon

the defendant's unreasonable conduct. Thus, as the court determined in Mrozka, the punitive damages award was not based upon the Church's religious beliefs.

1. The Church argues that just as a municipality is immune from a punitive damage award, it too is immune from a punitive damage award.

In addition, the Church argues that just as it is a violation of public policy to award punitive damages against a municipality, City of Newport v. Fact Concerns, Inc, 453 U.S. 247 (1981), it is a violation of Minnesota public policy to award punitive damages against an organized religion. This argument is based upon Judge Randall's dissent in Mrozka.

a. The Church argues that the punishment will be inflicted upon the innocent.

The Church argues that an award of punitive damages against it will punish the members of the church rather than the individual wrongdoers. In support of this position, the Church relies on City of Newport v. Fact Concerts, Inc., 453 U.S. at 247. In this case, punitive damages could not be awarded against a municipality, in part, because taxpayers would be compelled to pay for the commission of a tort although they personally had done nothing wrong.

The court finds the church's argument to be unpersuasive. As District Court Judge Phyllis Jones explained in her post trial memorandum in Mrozka, instead of being similar to taxpayers, members of a church are more like individual shareholders in a corporation, and in Minn. Stat. §549.20, punitive damages can be awarded against a corporation. Mrozka v. Archdiocese of St. Paul and Minneapolis, Anoka County Dist. Court. No. C6-89-012659 (December 28, 1990). For example, similar to a shareholder in a corporation, a

member of the church cannot be compelled to pay for the punitive award. Church members can choose to give less money to give to the church. Thus, the punitive damage award does not punish innocent members of the Church.

b. The Church argues that this award will not deter.

The Church argues that the only way the punitive damage award could deter future conduct would be if the Church and its members changed their beliefs and no longer practiced spiritual treatment. The Church argues that an award of $9 million would destroy the church in violation of public policy, and in violation of the Minnesota and U.S. Constitutions.

However, as discussed earlier there is no constitutional violation by deterring the unreasonable conduct of failing to provide medical treatment for an obviously sick child. In fact, the deterrent effect from the award of punitive damages should promote public policy because it will deter dangerous conduct.

c. The Church argues that the award gives a windfall to the plaintiff and his attorney by using resources that would have been used to meet human needs.

The Church argues that just as a punitive damage award against a government entity would create a "serious risk to the financial integrity of . . . government entities," City of Newport, 453 U.S. at 270, a punitive damage award against a church would create a serious risk to the financial integrity of the church. In City of Newport, 453 U.S at 270, the court held that any benefit that would be received from punitive damage awards against municipalities is far outweighed by the costs that would be incurred. For example, because municipal employees deal with a large number of people on a regular

basis, there would be a large number of claims brought for punitive damages against municipalities. Id.

In addition, evidence of a tortfeasor's wealth is traditionally admissible as a measure of punitive damages. As a result, the court in City of Newport, held that the punitive damage awards against a municipality would be very high because of the prejudicial effect that the municipality's unlimited taxing power would have on the punitive damage award.

Despite of the Church's argument regarding the effect of a punitive damage award on its financial integrity, the court finds that the Church's financial integrity is not harmed by allowing a punitive damage award.

There was no evidence submitted at trial to show that an award of punitive damage against the Church would harm the Church's financial integrity. There was no evidence submitted at trial to demonstrate that the punitive damage award is taking money that would otherwise be used to meet human needs.

In addition, unlike a municipality, the Church does not have an unlimited taxing power. As a result, unlike a municipality, a punitive damage award against a Church will not be prejudicially effected by the jury's belief that the Church has unlimited funds. Also, it is not clear that the Church's employees deal with as many people in as many different contexts as a municipality does through its employees. As a result, the court finds that the punitive damage award does not create a serious risk to the financial integrity of the Church.

d. The Church argues that this award burdens constitutionally protected rights.

As will be shown below, the award of punitive damages against the Church does not violate any constitutional rights.

e. The Church argues that punitive damages will be used to persecute religious groups.

There is no support in the record for the Church's claim that allowing a punitive damages award against a church will lead to the persecution of religious groups through punitive damages.

f. The Church argues that the award of punitive damages against a church is not supported by history.

The court believes that it is up the legislature to determine whether a church should be immune from a punitive damage award. The legislature has failed to create this immunity for churches, and as such there is historical support for the award of punitive damages against a church. Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806 (Minn. App. 1992),

Punitive damages exist in order to punish and deter. Johnson v. Ramsey County, 424 N.W.2d 800, 806, 807 (Minn.App. 1988). As is evident from the facts of this case, the award of punitive damages against the Church will help accomplish both of these goals. The pertinent facts in this case are as follows.

On the morning of May 6, 1989 Ian began to complain that he had a stomach ache. Kathleen McKown, Ian's mother, began to give him treatment through praying. Later in the day, Kathleen McKown also noticed that Ian had lost weight, and noticed that he had a fruity aroma on his breath. Kathleen McKown, Ian's mother is a member of the Church. The testimony did not establish that Ian considered himself to be a member of the Church.

On May 7, 1989, Ian again complained to Kathleen McKown about his stomach ache. Kathleen McKown now

discontinued her prayer treatment, and hired Mario Tosto, a journal-listed Christian Scientist practitioner. Through the Committee on Publication, the Church recommends that a journal-listed practitioner be hired in these kinds of situations.

Ian awoke two to three times in the early morning on May 8th complaining of a stomach ache. Between 8:30 a.m. and 11:00 a.m. on May 8th, Ian vomited approximately three to five times.

The Board of Directors of the Church has stated in a number of directives that the Committee on Publication should be contacted when a child is seriously ill. On May 8th Kathleen McKown contacted James Van Horn of the Committee on Publication and the Clifton House, a Christian Science nursing home.

Van Horn made sure that Kathleen McKown had contacted a journal listed Christian Science practitioner. Van Horn also telephoned the First Church in Boston on May 8, 1989 and testified that he mentioned that he was aware of a sick child in Minneapolis.

Kathleen McKown called the Clifton House several times on May 8th for help in dealing with Ian's condition. She spoke with Millie Khemakhem, a Christian Science nurse. Although Khemakhem denies that she made specific recommendations, Kathleen McKown testified at trial that Khemakhem advised her to give Ian small quantities of certain liquids. There was testimony at trial that these liquids actually had a detrimental effect on Ian's condition. On May 8th, William McKown also telephoned Van Horn because he was afraid that Ian was suffering from a contagious disease.

At approximately 5:00 p.m. on May 8th William McKown contacted Clifton House to inform them that Ian was not able to drink the liquids which had been recommended by Khemakhem. Ellen Edgar, another Christian Science nurse, told William McKown to continue giving Ian the liquids.

On the evening of May 8th, Ian was no longer able to drink any fluids. At this point, Ian also lost his ability to speak and have a conversation with others.

At approximately 8:00 p.m. on May 8th Kathleen McKown again contacted the Clifton House. She spoke to Ellen Edgar, and told Edgar that Ian's health was not improving. McKown was told that Clifton House would not admit Ian because he was under 16 years of age. However, Edgar later telephoned Kathleen McKown and arranged for Quinna Lamb, a Christian Science nurse, to go to the McKown's home.

Kathleen McKown testified that after her first conversation with Edgar, she had decided to take Ian to the hospital for medical treatment. However, Kathleen McKown decided not to take Ian to the hospital once Edgar contacted her and told her that Quinna Lamb was coming to her home.

As soon as Quinna Lamb arrived, she contacted Van Horn to tell him that she was at the McKown's home. This was the third telephone call that Van Horn had received that day concerning Ian's condition. In addition, on the evening on May 8th, both Kathleen McKown and Lamb contacted Tosto over the telephone to discuss the situation.

At approximately 2:20 a.m. on May 9th Ian died. The cause of his death was juvenile onset diabetes.

The Church helped train Lamb as a Christian Science nurse, and also provided her with her journal listing as a nurse. In addition, Kathleen McKown relied on directives from the Church in making her decisions regarding Ian's health care.

Under the facts stated above, a punitive damage award against the Church will help accomplish both the deterrence and punishment goals of punitive damages. The award will punish the church for its failure to establish adequate procedures to deal with the care of a morbidly sick child. The Church's position is outrageous, and the Jury so determined. In addition, the punitive damage award will deter the Church

from allowing another child to die when that child could be saved by using reasonable methods of health care. The life of a child is paramount, and the Church is held to the same standard of reasonable care as everyone else in this society.

C. The Church argues that the jury's award of $9 million in punitive damages should be remitted to zero because the award of any punitive damages against the Church would violate the religion clauses of both the United States and Minnesota Constitutions.

First, the Church argues that the award of punitive damages against it is unconstitutional under both the First Amendment to the United States Constitution, and under Article I, Section 16 of the Minnesota Constitution. The Church makes an analogy to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

In Gertz, the Supreme Court held that a private figure could not be awarded punitive damages in a libel action against the press unless the libel was made with actual malice. Id. at 350. Specifically, the court held that a defamation plaintiff who does not prove "knowledge of [the] falsity or reckless disregard for the truth" is not entitled to punitive damages. Id. at 349. Without these additional requirements for punitive damages, a jury would be free to punish unpopular opinions. Id. at 349. In sum, the Court held that it was necessary to provide some protection against libelous speech, which is not constitutionally protected speech, in order to ensure that nonlibelous speech, which is constitutionally protected, will not be restricted. Id. at 342.

The Church argues that there is even a stronger argument under the facts in the case at bar for constitutional protection from punitive damages than there was in Gertz. The Church argues that its conduct is constitutionally protected while the

conduct at issue in Gertz, libelous speech, is not constitutionally protected.

However, the Supreme Court has held that the state interest in protecting the health and welfare of its citizens can override the religious interests of others. Prince v. Massachusetts, 321 U.S. 158 (1944). As shown earlier, in this case, the state has the compelling interest of protecting the health and welfare of its citizens. The punitive damages award in the case achieves the state's goals of protecting the health and welfare of its citizens, and holding the Church liable in a tort action is the least restrictive way for the state to achieve its compelling state interest.

In Mrozka, the court held that punitive damages could be awarded against a church without violating the constitution. Similarly, punitive damages can be awarded in the case at bar.

Second, the Church argues that the jury's punitive damage award violates the Establishment Clause of the First Amendment to the United States Constitution. A state statute will not violate the Establishment Clause if: (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S.602, 612, 613 (1971). The Church argues that the jury's punitive damage award violates the Establishment Clause in the First Amendment because it fosters excessive entanglement with religion. The Church argues that through a civil jury, the state was able to make subjective value determinations concerning the value of its assets.

In Mrozka, 482 N.W.2d at 811, the court held,

> whether a governmental regulation creates excessive government entanglement usually depends on the character and purpose of the institution involved, the nature of the intrusion into religious administration, and

the resulting relationship between the government and the religious authority.

The court holds that the inquiry into the financial affairs of the Church did not violate the Establishment Clause of the First Amendment. The state involvement in Church affairs based upon the punitive damage award effected only financial concerns of the church. It did not involve any of the beliefs of the Church. As a result, the jury's punitive damage award did not violate the Establishment Clause in the First Amendment.

D. The Church argues that even if punitive damages may be awarded against the Church, the award should be remitted to zero because the award was not supported by clear and convincing evidence of malice.

The court must determine whether it was shown by clear and convincing evidence at trial "that the acts of the defendants show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1. A defendant has acted with deliberate disregard if he:

> has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and: (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others. Minn. Stat. 549.20.

In addition, punitive damages can be awarded against a master or principal based upon the act of an agent if:

(a) the principal authorized the doing and the manner of the act or (b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit, or (c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment, or (d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences. Minn. Stat. § 549.20.

1. The Church argues that because the jury's punitive damage award is abusive, the award should be remitted to zero.

The law does not favor the imposition of punitive damages, and therefore, punitive damages are only available in a limited number of circumstances. Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 891-892 (Minn. 1986). The Church argues that the facts of the present case do not support an award of punitive damages, and that the jury's punitive damage award is abusive.

However, the court found in its memorandum dated July 9, 1993 that the plaintiff could amend its complaint to allege punitive damages against the Church. In addition, as shown earlier, the court finds that based upon the facts presented at trial that the jury's award of punitive damages was not abusive.

2. The Church argues that the plaintiff did not meet his burden of showing by clear and convincing evidence that the defendants acted with malice.

The Church argues that the jury's punitive damage award was abusive and must be remitted to zero because the plaintiff did not meet his burden of showing by clear and convincing

evidence that the Church or any of its alleged agents acted with malice.

The Church also argues that it is "preposterous" to find that the Christian Science nurses acted in deliberate disregard of the rights and safety of others because they in good faith believed that spiritual treatment was more effective than medical treatment. The court properly instructed the jury on this issue under Minn. JIG 195.

The jury's award of punitive damages was supported by clear and convincing evidence that the defendants acted in deliberate disregard to the rights and safety of others. Through its agents, the Church deliberately disregarded the rights of Ian by failing to provide medical treatment to Ian when Ian's life depended on receiving this medical treatment.

Van Horn was an agent of the Church because he is the Committee on Publication, and according to Church policy, the Committee on Publication is to be contacted when a child with Christian Science parents becomes seriously ill and is not responding to Christian Science care within a reasonable amount of time. As Van Horn was the Committee on Publication, Van Horn was employed by the Church in a managerial capacity with authority to establish policy and make planning level decisions for the Church, and he was acting in the scope of that employment. Minn. Stat. § 549.20, subd. 2.

Pursuant to the Church's policy, Kathleen McKown and William McKown telephoned Van Horn on May 8th to inform him of Ian's condition. In addition, Van Horn received a phone call from Quinna Lamb, the Christian science nurse, on May 8th when she was at the McKowns' house. Despite these phone calls, and despite the fact that Van Horn was only to be contacted when a child with Christian Science parents was seriously ill and not responding to Christian Science treatment, Van Horn did not advise the McKowns to take Ian to the hospital to receive medical treatment. This is sufficient to

show that Van Horn acted with deliberate disregard for the rights of others because he deliberately proceeded to act in conscious disregard of the high degree of probability of injury to the safety of Ian.

As Quinna Lamb was a Christian Science nurse, she also was an agent of the Church. She acted with deliberate disregard for the rights of others. She was present at the McKowns home when Ian died, and she was aware of Ian's morbid condition. However, she failed take Ian to seek appropriate help. Consequently, she acted with deliberate disregard for the rights and safety of others because she proceeded to act in conscious disregard of the high probability of injury to Ian Lundman.

In addition, because Quinna Lamb was a Christian Science nurse who was brought to the McKowns to care for Ian, the Church ratified or approved her conduct while knowing of its character and probable consequences. Minn. Stat. § 549.20, subd. 2.

Tosto also was also an agent of the Church. Tosto was the journal listed practitioner contacted to pray for Ian Lundman. The McKowns contacted him because Ian was seriously ill and because his health was not improving. After being contacted, Tosto still did not advise the McKowns to seek medical treatment for Ian. As a result, Tosto acted in the deliberate disregard for the rights and safety of Ian Lundman because he proceed to act in the conscious disregard of the high degree of probability of injury to Ian Lundman.

Because Tosto was a journal listed practitioner who was retained to pray for Ian, the Church ratified or approved his conduct while knowing of its character and the probable consequences. Minn. Stat. § 549.20, subd. 2.

Based upon the acts of its agents, there was clear and convincing evidence presented at trial to show that the church acted in the deliberate disregard for the rights and safety of others.

The court has reviewed the analysis set forth on pages 23-26 of the plaintiff's post-trial memorandum, and has determined that the jury was properly instructed under Minnesota law on the issue of punitive damages. In order to prevail an a claim for punitive damages, a plaintiff must show that the defendant's conduct was a result of a malicious, willful, or reckless disregard for the rights of others. Wikert v. Northern Sand and Gravel, Inc., 402 N.W.2d 178, 182 (Minn.App. 1987).

E. The Church argues that if the court does not remit the punitive damages against the Church to zero, the court should substantially reduce the amount of the punitive damage award.

Pursuant to Minn. Stat. § 549.20, subd. 5,

> The court shall review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that section. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

Minn. Stat. § 549.20, subd. 3 states:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the

defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similary situated persons, and the severity of any criminal penalty to which the defendant may be subject.

1. Seriousness of public hazard.

The court finds that the conduct of the defendants created a serious hazard to the public because the defendants treated Ian Lundman as though he was an adult Christian Scientist, when he was an eleven year old child. Ian Lundman was not in the position to make a choice as to the type of treatment he should receive. There is no basis in the law that an eleven year old child is responsible for making such a momentous decision.

2. Profitability of misconduct.

This factor does not apply to this case.

3. Duration of the misconduct and any concealment of it.

This factor does not apply to this case.

4. Defendant's degree of awareness of the misconduct.

The Church was aware that children are given spiritual treatment and not medical treatment. The defendants were

direct and knowing participants in the withholding of medical care for Ian Lundman.

5. Defendant's attitude and conduct upon discovery of the misconduct.

None of the evidence presented at trial suggested in any way that the Church will behave differently in the future when faced with a similar situation.

6. Number and level of agents involved.

The parties involved include James Van Horn, the State Committee on Publication, Quinna Lamb, a Christian Science nurse, and Mario Tosto, a journal listed practitioner.

7. Defendant's financial condition.

There were two witnesses who testified at trial regarding the financial condition of the Church. The plaintiff's witness was Thomas Danielson, ("Danielson"), a Certified Public Accountant, and the Church's witness was Donald Bowersock, (Bowersock"), the managing treasurer for the Church.

Danielson testified that the Church has a net worth of $136,934,000. Of this net worth, Danielson testified that the Church owns buildings in Boston worth at least $94,089,000, and that all of these buildings are owned by the Church and are unencumbered.

Bowersock agreed that the net worth of the Church is $136,934,000, the same amount as Danielson determined. However, Bowersock testified that the value of the Church's unrestricted funds, funds which the Church can use to pay for any of its obligations, are a negative $83,000,000. Bowersock arrived at the figure of negative $83,000,000 as follows.

First, he testified that the Church has $111,000,000 of restricted funds, funds which were donated to the Church with restrictions on how they can be spent. Because these funds are restricted funds, they are not available to pay general obligations of the Church. Accordingly, Bowersock subtracted $111,000,000 from the Church's net worth of $136,000,000. After subtracting the $111,000,000, there was a balance of $26,000,000.

Bowersock then testified that $15,000,000 had to be subtracted from the $26,000,000 because this figure also was not available to pay general obligations of the Church. Rather, the $15,000,000 was needed as a pension reserve. He testified that a pension reserve was needed so that the Church will be able to pay for its current and future pension obligations. After subtracting the $15,000,000 from the $26,000,000, the Church has $11,000,000 of net assets.

Bowersock then testified that the value of the Church's buildings in Boston, $94,089,000 had to be subtracted from the $11,934,000. He did not state a reason on the record as to why he determined that these funds were not available to pay for the Church's general obligations. As a result, the Church argues that the unrestricted funds of the Church are actually a negative $83,000,000, and that it does not have the assets to pay for the punitive damage award.

There was further testimony at trial regarding the financial condition of the Church. In the future, the Church expects to receive legacies and trust funds of approximately $131,000,000. This figure is not reflected in the Church's balance sheet, nor in the Church's net assets. In addition, there was testimony at trial that the Church is the primary residual beneficiary of trusts valued at approximately $134,000,000, of which approximately $124,000,000 are irrevocable trusts. Also, there was testimony at trial that the Church has approximately $23,000,000 in income earning buildings. The exhibit which contained information regarding these buildings

was never offered into evidence. There also was no testimony as to whether the $23 million of income earning buildings was included in Exhibit 196, the balance sheet referred to above.

It is clear that the pension fund, and buildings, and other income made by the Church could be subject to a punitive damage judgment. Also, some of the legacies will be available for payment of this judgment as time goes on. Although the Church argues that the pension funds cannot be used to pay for the punitive damage award, there was evidence at trial, through Danielson, that the Church can use these funds to pay for general obligations, such as the punitive damage award. The Court finds that the Church has the financial ability to pay for the $9,000,000 punitive damage award.

8. The total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

There was no evidence presented at trial on these issues.

Based upon a consideration of all of these factors, the court finds it unnecessary to reduce the jury's $9 million punitive damage award.

F. Defendants argue that the $5.2 million award must be remitted by the court.

1. Defendants argue that the jury's award of $5.2 million in compensatory damages was contrary to the evidence presented at trial.

Defendants argue that Douglas Lundman's relationship with Ian was not close enough to justify a high award of compensatory damages. The defendants again cite an unpublished opinion, Schmidt v. Heagy, Minn. App. C1-93-797, (1994) cited in, Finance and Commerce Appellate Courts Edition, Jan. 7, 1994, and argue that the plaintiff in the case at bar is not entitled to an award as high as the $1,000,000 in Schmidt.

The defendants argue that the family in Schmidt was a nuclear family in which both parents lived at home with the child and both had constant contact with the child. As a result, defendants argue that the plaintiff in Schmidt was entitled to a high compensatory damage award.

Defendants argue that in comparison to Schmidt, Douglas Lundman did not have as close a relationship with Ian, and that Douglas Lundman is not entitled to as high a compensatory damage award as was given in Schmidt. Defendants argue that Douglas Lundman did not have a regular and intense relationship with Ian, that Douglas Lundman lived out of state, chose career opportunities over his relationship with Ian, visited Ian infrequently, and was delinquent on his child support payments.

In spite of these arguments, the court finds that there was sufficient evidence to show that Douglas Lundman had a close, loving relationship with Ian. In addition, there was sufficient evidence submitted at trial to demonstrate that Whitney Lundman also had a close, loving relationship with Ian. See, infra, pg. 46. As a result, there is no basis to distinguish the loving relationship in the case at bar from the loving relationships involved in Schmidt.

2. Defendants argue that the jury's award of $5.2 million in compensatory damages was based upon the passion and prejudice of the jury.

The defendants argue that the jury's compensatory damage verdict was based upon passion and prejudice. The defendants argue that the speed with which the jury decided upon the verdict, and the excessive size of the verdict are evidence of the jury's passion and prejudice. The verdict was for $5.2 million in compensatory damages, and the jury decided upon this verdict in less than one day. However, the court finds that neither the size alone nor the speed with which the jury decided on the verdict is evidence of the jury's passion or prejudice.

The defendants also argue that some of the juror's statements after the trial are further evidence of the jury's passion and prejudice. These statements were submitted to the court as part of the August 27, 1993 affidavit of Ansis Viksnins. However, these statements are hearsay and will not be considered by the court.

3. The defendants argue that the jury's award of $5.2 million in compensatory damage award is grossly excessive.

Pursuant to Minn. Stat. §573.02, the Minnesota wrongful death statute, the jury is to award an amount of damages which "the jury deems fair and just in reference to the pecuniary loss resulting from the death." Minn. Stat. §573.02. The Minnesota Supreme Court has held that, "(b)ecause the pecuniary loss sustained by parents for the wrongful death of a child cannot be accurately and precisely determined, the task is peculiarly one for the jury." Ahrenholz v. Hennepin County, 295 N.W.2d 645, 648 (Minn. 1980).

The "evidence to be considered in measuring damages for wrongful death includes the decedent's character, health, habits, talents, prospects, earnings, and parental contributions." Ahrenholz v. Hennepin County, 295 N.W.2d 645, 648 (Minn. 1980).

There are additional factors which courts analyze in child wrongful death cases. These factors are, "the decedent's age, intelligence, academic achievement, wages earned, career prospects, and care and devotion to parents." Id. In addition, the "decedent child's probable contributions to the parents may be considered in computing damages to the parents for loss of their child." Id.

In Fussner v. Andert, 261 Minn. 347, 353-353, 113 N.W.2d 355 359 (1961), the court again added factors to be analyzed in determining the loss from the wrongful death of a child. Fussner held that the "pecuniary loss" which a parent sustains from the loss of a child is not limited to only the financial loss resulting from the child's death. Rather, "there is a growing appreciation of the true value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance which were once considered to be only of sentimental character." 261 Minn. at 352-353, 113 N.W.2d at 359. These same family relationship factors are also relevant in determining the loss which a sibling sustains from the death of a brother or sister.

The test to determine whether a verdict should be set aside because it is excessive is whether the amount of the verdict "shocks the conscience." Verhel v. Independent Sch. Dist. No. 709, 359 N.W.2d 579, 591 (Minn. 1984). The defendants argue that in comparison to the recovery allowed in other cases for the wrongful death of a child, the jury's $5.2 million compensatory damage award was excessive. The defendants cite Schmidt v. Heagy, Minn. App. C1-93-797, (19994) cited in, Finance and Commerce Appellate Courts Edition, Jan. 7, 1994, to support their argument that the jury's verdict was excessive.

Plaintiff argues that in consideration of the excessiveness of a verdict, the court should not make comparisons to other verdicts. In Moteberg v. Johnson, 297 Minn. 28, 34, 210

N.W.2d 27, 31 (1973), the court held that "in considering whether a verdict is excessive, a comparison with previous verdicts is not justified because of the variations in facts and the changes in the economy." However, in most child wrongful death actions there appears to be a discussion and comparison of the verdict with other child wrongful death verdicts. Ahrenholz v. Hennepin County, 295 N.W.2d 645, 649 (Minn. 1980); Schmidt v. Heagy, Minn. App. C1-93-797, (19994) cited in, Finance and Commerce Appellate Courts Edition, Jan. 7, 1994. As this is a child wrongful death action, the court will take into account other Minnesota child wrongful death cases.

In Schmidt the jury awarded a verdict of $2.5 million for the wrongful death of a 10 year old child. The Schmidt court analyzed other child wrongful death verdicts and determined that the jury's award of $2,500,000 was excessive. After comparing its case to other cases involving the wrongful death of children, the court found that $1,000,000 was the highest possible verdict which a reasonable jury could have given under the facts in the case. Schmidt v. Heagy, Minn. App. C1-93-797, (19994) cited in, Finance and Commerce Appellate Courts Edition, Jan. 7, 1994.

Like the court in Schmidt, the court and the jury in the case at bar were both faced with the difficult and troublesome task of placing a monetary value on the loss of a child and the loss of a sibling. This type of calculation is inherently subjective and arbitrary. There is no amount of money that could ever adequately replace the priceless relationships and experiences that Ian would have shared with his family had he lived.

In spite of these problems in calculating the amount of the compensatory damage award, the court's task is to determine whether the jury's award was excessive, and thus whether the jury's award "shocks the conscience." Verhel v. Independent Sch. Dist. No. 709, 359 N.W.2d 579, 591 (Minn. 1984). The

Court has reviewed the cases cited by counsel, and has determined that under the facts presented at trial, the jury's award of $5.2 million in compensatory damages is excessive. Having determined that the jury's award was excessive, the court must determine what is the highest amount that a reasonable jury could award under the facts of the case. Sandt v. Hylen, 301 Minn. 475, 224 N.W.2d 342 (1974).

Through the testimony of Douglas Lundman, the jury witnessed a very loving father. Mr. Lundman presented evidence that he had very close relationship with his son. He described Ian's growth in great detail. From the time that Ian was a young boy, Douglas Lundman involved himself directly in Ian's life. He testified as to Ian's fears and joys. It was clear from his testimony that he shared in his son's formative years. He was there during times of crisis, and provided his son with a father's support throughout his life. He played with him on a regular basis, and took him on excursions, including camping.

While Kathleen and Douglas Lundman provided a loving, stable and caring environment for Whitney and Ian Lundman, during the time that the parties were considering separating and divorcing, Douglas Lundman remained with the family. After the divorce in 1984, he maintained contact with his children, visiting them on a regular basis, doing such things as preparing meals, spending time, playing with the children, taking trips with the children, taking the children on camping trips, and a host of other activities related to caring for the children. Mr. Lundman's description of his son and daughter's behavior was remarkably precise and detailed, demonstrating the closeness and love that he had for his children.

Other activities that he participated in with his children included horseback riding, kite flying, ice skating, sledding and camping. He was able to relate many stories about his children during his testimony.

Beginning in December of 1987 through May of 1989, with the exception of the summer months of 1989, Douglas

Lundman was teaching at the University of Kansas. He made every effort to see his children during this period, including driving an automobile 10-12 hours each way to and from Kansas to Minnesota approximately every other weekend from December 1989 through May 1989. In addition to this, he paid for air fare to Minneapolis and back in order to see his children, even though he could not afford this. During the months of May through September 1988, Douglas Lundman lived in Minneapolis. Although he was not employed during this time, he made many trips with his children and maintained his visitation schedule. The children visited him in Kansas sometime during the period from September through May 1989, and his last contact with Ian was on April 26, 1989 when he was in Minneapolis.

It is also a fact that Mr. Lundman was in arrears in child support in an amount of approximately $3,000. Some of this arrearage could be attributed to the cost of flying to Minneapolis to see his children during the time he was in Kansas. There was no indication that his arrearage on child support was based on a lack of concern for his children. According to his testimony, he was making every effort to maintain his obligation.

Douglas Lundman was intimately involved with the lives of Whitney and Ian. He was constantly reading stories and poetry to his children, and singing songs with his children. He was a critical observer of his children's progress.

Ian was very close to his father, and according to the testimony, always looked forward to having contact with his father. There was no dispute that the relationship between Douglas Lundman and Ian Lundman was exceptionally close and caring.

The relationship that Ian and Whitney established was also unusually close. Because of the frequent moves of their family, Ian and Whitney were not only brother and sister, but were also close friends and companions.

The court finds that the highest compensatory damage award a reasonable jury could have given under the facts of this case is $1,500,000.

III. Defendant's argue in the alternative that they are entitled to a new trial.

A. Standard for a new trial.

Under Minn. R. Civ. P. 59.01 a new trial may be granted for the following reasons:

(a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;

(b) Misconduct of the jury or prevailing party;

(c) Accident of surprise which could not have been prevented by ordinary prudence;

(d) Material evidence newly discovered, which with reasonable diligence could not have been found and produced at trial;

(e) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;

(f) Errors of law occurring at the trial, and objected to at the time, or if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion;

(g) The verdict, decision or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence. Minn. R. Civ. P. 59.01.

The reasons listed in Minn. R. Civ. P. 59.01 are subject to the harmless error rule in Minn. R. Civ. P. 61. Pursuant to Minn. R. Civ. P. 61,

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to be to the court inconsistent with substantial justice. The court at every stage of the preceding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Courts will grant relief for errors which would have changed the result in the case. Simchuck v. Fullerton, 299 Minn. 91, 216 N.W.2d 683 (1974). However, an error is considered harmless if there is no reasonable probability of any other result in a new trial. Brown v. City of Minneapolis, 136 Minn. 177, 161 N.W. 503 (1917). Consequentially, "unless the error or irregularity complained of has resulted in prejudice to the complaining party, there is no injustice to be corrected, and the interests of justice do not require that a new trial be granted. DeVere v. Parten, 222 Minn. 211, 23 N.W.2d 584 (1946). In addition, the burden is on the moving party to

show that any error in the trial was a prejudicial error. McDowell v. Hanson, 204 Minn. 349, 283 N.W. 537 (1939).

Corrective measures, such as curative instructions to the jury, and sustaining an objection, are usually sufficient to make any error in the trial a harmless error. Phelps v. Blomberg Roseville Clinic, 253 N.W. 2d 390 (Minn. 1977); Johnson v. O'Brien, 258 Minn. 502, 105 N.W.2d 244 (244).

If "the verdict is right as a matter of law there will be no reversal on account of errors in the admission of evidence, the instructions of the court, or misconduct of counsel which does not affect the correctness of the verdict." McGuiggan v. St. Paul City Railway Co., 299 Minn.534, 538, 40 N.W.2d 435, 437 (Minn. 1949).

B. Defendants arguments concerning relevance and applicability of Minn. Stat. §§ 609.378 and 626.556.

The defendants make several arguments concerning Minn. Stat. §§ 607.378 and 626.556. Defendants argue that these statutes replace the common law standard of care, that informed compliance with these statutes is conclusive evidence of due care, and that it was an error for the court to prohibit any introduction to or reference to these statutes. In sum, defendants argue that the criminal statutes create a standard of conduct which the jury should have considered in this action. The court has addressed these arguments in its analysis of defendants' motions for JNOV. See, infra part I.(D.).

C. Defendants argue that Brown v. Laitner, Mich. Ct. App. No. 73903 (Dec. 17, 1986), order granting leave to appeal vacated, 432 Mich. 861, 435 N.W.2d 1 (1989), which rejected a plaintiff's wrongful death action against the Church, controls this action.

The defendants argue that based upon Brown they did not breach any duty of due care because they acted in compliance with Minn. Stat. §§ 609.378 and 626.556. In Brown, the plaintiff's brought a wrongful death claim against the Church. The court held that the defendants were entitled to summary judgment as a matter of law because the defendants had acted in compliance with the Michigan child protection and reporting statutes. However, Brown differs from the case at bar in two important ways.

First, the child protection and reporting statutes in Brown are different from their Minnesota counterparts. As a result, Brown does not control the disposition of this case. Pursuant to Mich. Stat. §722.634, part of the Michigan child protection law, "a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian." In addition, under Mich. Stat. 722.633, the Michigan reporting statute, "a person, required to report an instance of suspected child abuse or neglect, who is required to report under this act and who fails to do so, is civilly liable for the damages proximately caused by the failure." Mich. Stat. § 722.633. As a result, the court held that the reporting statute applied to a civil cause of action.

Unlike the Michigan child protection reporting statute, the Minnesota child protection and reporting statues do not state that they apply in the civil context. As a result, the Minnesota child protection and reporting statutes, unlike their Michigan counterparts, do not apply to civil causes of action. See, Minn. Stat. §§609.378 and 626.556.

Second, Brown is different from the case at bar because the court in Brown specifically held that the plaintiff did not bring a common law negligence claim. The court in Brown held that the plaintif's claim was actually a claim for clergy malpractice. The court stated that, "Plaintiff's effort to label

this case as ordinary negligence involving a secular reasonable man must be to no avail. Courts do no let labels control a case where the substance is to the contrary." Brown, Mich. Ct.App. No. 73903 at 17. As a result, the common law standard of care was inapplicable.

As shown earlier, the court has determined that the plaintiff has brought a claim for ordinary negligence. As a result, the common law standard of care applies in the case at bar.

D. The Court's evidentiary rulings.

1. Exclusion of exhibit 8 as an attorney-client privileged document.

Before the trial began, plaintiff inadvertently gave the defendants a copy of exhibit 8, a letter between plaintiff and his attorney. The court ruled that the defendants must return exhibit 8 to the plaintiff.

Courts have analyzed the issue of whether an inadvertent disclosure constitutes a waiver of the attorney client privilege in three different ways. Some courts have held that a document is no longer privileged after it is inadvertently disclosed because the document is no longer confidential. In Re Sealed Case, 877 F.2d 976 (D.C.Cir. 1989). Other courts have held that the inadvertent disclosure does not create a waiver of the privilege because the privilege can only be waived intentionally. Mendenhall v. Barber-Greene Co., 531 F.Supp. 951 (N.D. Ill. 1982). A third set of courts hold that an inadvertent disclosure creates a waiver of the privilege only if the party asserting the privilege failed to take reasonable steps to preclude the disclosure from occurring, or when a waiver would be unjust. Transamerica Computer v. International Business Machines, 573 F.2d 646 (9th Cir. 1978).

This court follows the approach set forth in Mendenhall v. Barber-Greene Co., 531 F.Supp. 951. Mendenhall held, "We are taught from the first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.' Inadvertent production is the antithesis of that concept." Id. at 955, quoted in, Ross v. Franzen, 668 F.2d 933, 941 (1982).

As the plaintiff in the case at bar did not intentionally aandon or relinquish his right to an attorney-client privilege, this privilege was never waived. Thus, exhibit 8 was properly excluded from evidence.

2. Defendants' jury instruction that plaintiff committed perjury.

As shown above, exhibit 8 is a privileged document, and thus it cannot be used by defendants to show that plaintiff committed perjury. The defendants' request for jury instructions relating to plaintiff's perjury were correctly denied.

3. Stephen Cohen's testimony regarding Clifton House's liability insurance.

There was no objection made at the time this testimony was made. However, even if the defendants had made an objection, this testimony was relevant and was not prejudicial to the defendants.

4. The Court's exclusion of evidence of alleged threats by Martha Abbott Ladner.

This evidence was irrelevant to this case, and the record adequately discussed this issue.

5. The court's exclusion of impeachment evidence against Mary Moen.

The record adequately discussed this issue.

6. The court's admission of exhibit 49, the letter from Van Horn to County Attorney Johnson.

The record adequately addressed this issued.

7. The court's decision prohibiting defendants from asking plaintiff questions of what he would have done if Ian had chosen spiritual care.

The record adequately discussed this issue.

8. The Court's admission of exhibit 25.

This exhibit was properly admitted, as shown in the record.

9. The court's decision not to have the jury instructed that Quinna Lamb was a professional or a nurse under JIGS 431 and 432.

As shown earlier, the standard of care applicable to this case is a reasonable person standard. As a result, the court properly excluded JIGS 431 and 432 from the jury instructions.

10. The court's failure to provide superceding cause jury instructions.

This issue was adequately addressed in the record.

11. The court's admission of evidence regarding Quinna Lamb's prior experiences with medical care.

Quinna Lamb argues that the court erred in allowing plaintiff's counsel to ask her about her prior medical experience, while prohibiting plaintiff from asking William McKown about his medical history. This issue was adequately addressed in the record.

12. The court's admission of Van Horn's advice to defendants concerning their legal rights and obligations.

This issue was adequately addressed in the record.

13. Court's admission of evidence that Mario Tosto and James Van Horn failed to follow the policies of the Church.

Because this evidence was relevant to plaintiff's claim for common law negligence, the court properly admitted this evidence.

14. Exclusion of State v. McKown, 425 N.W.2d 63 (Minn. 1991).

The court allowed the defendants to present evidence that Kathleen McKown had been charged with certain crimes related to the alleged conduct in this case and that those charges were eventually dismissed. The defendants argue that additional details relating to the criminal proceedings should have been presented to the jury, including providing the jury a copy of the decision in State v. McKown, 425 N.W.2d 63

(Minn. 1991). This evidence was not relevant and was properly excluded.

15. Whitney Lundman affidavit.

Whitney Lundman's affidavit was withdrawn from evidence by the court. The court has the discretion to withdraw inadmissible evidence. Mettling v. Mulligan, 225 N.W.2d 825, 303 Minn. 8 (1975). Whitney Lundman's affidavit was inadmissible for the reasons set forth in the Court's Order and Memorandum of June 4, 1993. This court may withdraw inadmissible evidence at any point during the trial.

16. Spousal Privilege

The Court's ruling to allow William McKown to testify over objection by his counsel that his testimony violated the marital privilege under Minn. Stat. §595.02, subd. 1(a) which states:

> A husband cannot be examined for or against his wife without her consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage.

There are two privileges set forth in the statute. First, a husband cannot be required to testify "for or against his wife without her consent", second, a husband cannot "be examined as to any communication" made to the wife during the marriage. There is no claim that the second privilege applies here because there was no spousal "communication" involved in this case.

The first privilege did not apply in this case because there was nothing adverse to Kathleen McKown's interest in the testimony of William McKown. It is clear that for the privilege to apply there must be adverse testimony. U.S. v. Smith, 472 F.2d 398, 401 (8th Cir. 1984).

17. Admission of expert testimony of Steven Cohen

The court is vested with broad discretion in determining the admissibility of expert testimony and in determining whether a witness may be qualified as an expert through his knowledge, skill, training, or education Erickson v. Strickler, 252 Minn. 351, 90 N.W.2d 232 (Minn. 1958); Law v. Essex Manufacturing, 396, N.W.2d 83 (1986).

The court determined that Steven Cohen qualified as an expert due to his education, knowledge and professional experience concerning nursing homes and health care administration. The defendant, Clifton House argued that Mr. Cohen's testimony should not have been allowed on the issue of its negligence since Mr. Cohen had no knowledge of the standards that apply to a Christian Science nursing home and that his testimony was therefore improper. The court has discussed this issue earlier in its memorandum and finds the introduction of this expert testimony to be proper based on the applicable standards for negligence that the court determined were proper in this case.

18. Exclusion of Defendant William McKown Books and Periodicals

During the trial, defendant, William McKown sought to introduce spiritual healing literature. The record adequately discussed this issue. Defendant has not shown that the exclusion of this evidence was prejudicial.

19. Exclusion of Minnesota Statutes concerning Christian Science.

Early in the case, the court ruled that the common law standard of care of the reasonable person would apply. The court determined that admission of evidence concerning other statutory standards of care were irrelevant. In addition, any error by the court in the manner in which the statutes were withdrawn from evidence was not a prejudicial error.

20. Admission of postmortem photographs of Ian Lundman.

The admission of photographs of Ian Lundman were relevant. The court determined under Minn. R. Evid. 403 that the photographs' probative value outweighed any potential prejudice to the defendants. There was a screening process done by the court which resulted in many photographs being excluded from evidence. See, Trial Record. Also, the court determined that there was sufficient foundation to admit the photographs.

21. Admission of Dr. Etzweiler's testimony regarding the reasonableness of taking a seriously ill child to the hospital

An expert is permitted to comment on the issue of negligence. Behkle v. Conwed Corp., 474 N.W.2d 351,357 (Minn. App. 1991); Minn. Evid. 704. Dr. Etzweiler was allowed to give the jury his expert opinion that based on his knowledge and experience of treating children, that a reasonable person would have recognized the serious nature of Ian Lundman's condition.

E. Defendants' allegations of misconduct by plaintiff and by plaintiff's counsel.

1. Quinna Lamb's testimony regarding her reliance on Minn. Stat. §§626.556 and 609.378.

The trial record adequately addressed this issue.

2. Alleged prejudicial misconduct by plaintiff and his counsel.

Defendants argue that plaintiff's counsel made an improper argument in his opening statement when he stated that the standard for punitive damages was a "little bit" higher than the standard for awarding damages for negligence. Defendants also argue that plaintiff's counsel improperly told the jury that the "deliberate disregard" standard for punitive damages was the same as the "willful indifference" standard. The record adequately discussed both of these issues.

Defendants also make other allegations of misconduct by plaintiff and his counsel, and they argue that this misconduct deprived them of a fair trial. First, it is claimed that plaintiff improperly brought photographs of Ian Lundman to the witness stand. The trial record adequately discussed this issue.

Second, defendants claim that plaintiff made demonstrations to the jury outside the courtroom designed to show his grief and anger to jurors. The court was confronted with this problem during trial and the record adequately addressed this issue.

Third, defendants allege that the court erred in allowing testimony about plaintiff's use of medication for depression, arguing that such testimony was irrelevant and had prejudicial impact on the jury. The defendants also argue that the jury was not instructed to disregard this testimony despite requests by defendants. The court made an adequate record of this at

the time of the objection and will rely on that record as being sufficient. The court finds that the admission of that evidence was relevant and that any prejudicial impact was outweighed by its probative value.

Fourth, defendants allege that plaintiff's counsel made improper speeches and objections to the jury despite warnings by the court and that the court refused to address these actions despite requests by defendants. The trial record was sufficient to address all of these issues.

Fifth, defendants allege plaintiff's counsel intentionally elicited from one of plaintiff's experts testimony about liability insurance held by a defendant despite the lack of relevance and prejudicial impact of such information on the jury.

Sixth, defendants maintain that plaintiff' counsel engaged in improper examinations and argument which ridiculed defendants, religious beliefs and forced them to prove the reasonableness or truth of those beliefs. The court ruled on these questions throughout the trial and in some of its pretrial orders. In addition, the record was adequate in discussing these claims.

Seventh, defendants argue that plaintiff's counsel engaged in improper examination and argument concerning alleged policies and practices of Christian Science, whether or not defendants followed such policies or practices, and whether the Church properly informed other defendants of these policies. These issues were ruled on during the trial and there was an adequate trial record made on these issues.

Eighth, defendants allege that plaintiff's counsel improperly used prior testimony of defendants at trial, and "impeached" defendant and his own client when no impeachment was proper. Such tactics created the false impression that defendant was not being forthcoming in their testimony at trial. The court failed to stop this practice despite repeated objections by defendants. The trial record adequately discussed all these issues.

Ninth, defendants allege plaintiff failed to respond to defendants discovery request and provide defendants with any amount of estimate of plaintiff's claim damages, but instead stated a damage figure for the first time in closing argument, when the Church lacked the opportunity to respond. The court erroneously denied defendants' pretrial motion to compel plaintiff to disclose this information. See the court order of December 10, 1992. Also, this issue was a part of the trial record and was adequately discussed.

Tenth, it is alleged by defendant that in closing argument in the compensatory trial, plaintiff's counsel improperly argued matter that were totally without support in the evidence, irrelevant under the applicable law, highly prejudicial, and, in more than one instance, contrary to specific orders of the court. These arguments included, without limitation, argument that Whitney Lundman was not and never had been a Christian Scientist; argument that Mr. Van Horn had attempted to improperly influence the criminal proceedings; argument about exhibit 45; and argument suggesting that defendant's proof was insufficient because their failure to call expert witnesses. The record adequately discussed these issues.

F. Plaintiff's alleged contributory negligence.

The defendants argued that the plaintiff's own contributory negligence, rather than the negligence of any of the defendants was the cause of Ian's death. However, the court finds that the evidence submitted at trial did not show that the plaintiff's conduct constituted contributory negligence. Rather, the evidence submitted at trial was sufficient to support the jury's finding that the defendants were negligent and were the proximate and direct cause of Ian's death.

G. The defendants argue that the court improperly denied their pretrial motion for a bifurcation of trials as between the Church and the other defendants.

The record adequately addressed this issue.

H. The Church argues that the court erred in denying the defendants' motions for directed verdict and the court erred in denying the Church's motion for reconsideration of the court's decision to allow punitive damages against the Church.

As in shown earlier, the court correctly allowed the plaintiffs to amend the complaint and allege punitive damages against the Church. In addition, all of the motions for directed verdict were properly denied.

I. The defendants argue that the court should have granted defendants' motion for a mistrial.

Defendants argue that the plaintiff argued a theory at trial that was not set forth in its complaint. The court finds that the theories the plaintiff presented at trial were pleaded in the complaint. The defendants' motion for a mistrial was properly denied.

J. The defendants argue that the jury's verdicts did not reflect the present value of money awarded in the verdicts.

There is no evidence to support the defendants" claim that the jury did not consider the present value of money when they awarded their verdicts.

K. Peremptory Challenges

Minn. Stat. §546.10 sets forth the number of peremptory challenges allowed to the parties in a civil case.

The relevant part of the statute provides:

> Each party shall be entitled to two peremptory challenges, which shall be made alternatively beginning with the defendant. The parties to the action shall be deemed two, all plaintiffs being one party, and all defendants being the other party, except, in case two or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, may allow the defendant or defendants on each side of the adverse interests not to exceed two peremptory challenges. When the peremptory challenges have been exhausted or declined, the first six of the remaining jurors shall constitute the jury.

Two peremptory challenges are permitted to each side, but an additional two challenges may be allowed, if the defendants have adverse interests and those interest require due protection.

In Hunt v. Regents of University of Minnesota, 460 N.W.2d 28 (Minn. 1990), the court points to two situations which may establish adversity of interests. First, the filing of an affirmative defense by one of the defendants against another defendant would indicate an adverse interest. Second, adversity may exist when a plaintiff asserts different theories against multiple defendants. In Electric Service Co. v. Lakehead Electric Co., 291 Minn. 22, 26, 189, N.W.2d 489, 492 (1971), cited in Hunt, supra, the court allowed an additional peremptory challenge because two different theories were alleged by the plaintiff against the defendants.

None of the defendants brought a cross claim during the course of this litigation. Thus, there is no adverse interest among these defendants on this ground. Next, there is no adversity based on multiple theories against certain defendants. This case was tried against all the defendants on a theory of negligence. Defendants argue that plaintiff advanced different theories of negligence as to each defendant, creating an adverse interest among the defendants. This does not amount to a showing of adversity among the defendants. Finally, defendants' agency argument on adversity fails. There has been no showing of 'actual' adversity. The defendants merely speculate there might be a potentially adverse relationship.

Therefore, the defendants are not entitled to a new trial on either the compensatory or punitive damages awarded by the jury pursuant to Minn. R. Civ. P. 59.01 and Minn. R. Civ. P. 61. The defendants are not entitled to a new trial based upon: the unfairness of this trial; misconduct by the jury or by plaintiff, or by plaintiff's counsel; an accident or surprise; material evidence newly discovered, excessive damages or damages influenced by passion or prejudice, errors of law; or insufficiency of the evidence.

S.J.R.

STATE OF MINNESOTA
IN SUPREME COURT

C1-94-891 - C3-94-892 - C5-94-893
C7-94-894 - C9-94-895 - CO-94-896
C2-94-897

Douglass G. Lundman, as Trustee for the next of kin of Ian Douglass Lundman, Deceased,

Respondent,

vs.

Kathleen McKown,

Appellant (C2-94-897),

William McKown,

Appellant (C5-94-893),

Mariano Victor Tosto,

Appellant (C3-94-892),

Quinna Lamb, n/k/a Quinna Giebelhaus,

Appellant (Cl-94-891),

Clifton House, Inc.,

Appellant (C9-94-895),

Metropolitan Open School,

Defendant,

The First Church of Christ, Scientist,

Appellant (C0-94-896),

James Van Horn,

Appellant (C7-94-894).

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petitions of Douglass G. Lundman, Quinna Lamb n/k/a Quinna Giebelhaus, William McKown, Kathleen McKown, Mario Tosto and the conditional petitions of James Van Horn, Clifton House, Inc. and the First Church of Christ, Scientist for further review be, and the same are, denied.

IT IS FURTHER ORDERED that all amici curiae requests are accordingly denied.

IT IS FURTHER ORDERED that Mario Tosto's motion for admission pro hac vice is denied.

Dated: May 31, 1995

BY THE COURT:

s/ A. M. Keith
Chief Justice